INTERSTATE COMPACTS; REAUTHORIZATION OF THE NEGOTIATED RULEMAKING ACT

BEFORE THE

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

H.J. Res. 113 and H.J. Res. 116

JUNE 27, 1996

Serial No. 77

Printed for the use of the Committee on the Judiciary

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INTERSTATE COMPACTS; REAUTHORIZATION OF THE NEGOTIATED RULEMAKING ACT

THURSDAY, JUNE 27, 1996

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL AND
ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2237, Rayburn House Office Building, Hon. George W. Gekas (chairman of the subcommittee) presiding.

Present: Representatives George W. Gekas, Bob Inglis, Steve Chabot, Michael Patrick Flanagan, Jack Reed, and Jerrold Nadler.

Also present: Raymond V. Smietanka, chief counsel; Rebecca Ward, secretary; and Agnieszka Fryszman, minority counsel.

OPENING STATEMENT OF CHAIRMAN GEKAS

Mr. GEKAS. This hearing meeting and markup session of the Administrative Commercial Law Subcommittee of the Judiciary Committee will come to order.

Because we have no quorum, we will recess until the appearance of eight or more members. But I have kept true to my own value of opening a session approximately on time.

We will recess now until the others appear.

[Recess.]

Mr. GEKAS. Noting the presence of the gentleman from Rhode Island, Mr. Reed, we now constitute a quorum of two for the purpose of proceeding with the business at hand, and the gentleman from New York, Mr. Nadler.

The first item of business is H.J. Res. 166. It is a proposed compact between the State of Virginia and the State of Tennessee.

[The bill, H.J. Res. 166, follows:]

104TH CONGRESS
2D SESSION

H. J. RES. 166

Granting the consent of Congress to the Mutual Aid Agreement between the city of Bristol, Virginia, and the city of Bristol, Tennessee.

IN THE HOUSE OF REPRESENTATIVES

MARCH 21, 1996

Mr. BOUCHER (for himself and Mr. QUILLEN) introduced the following joint resolution; which was referred to the Committee on the Judiciary

---

JOINT RESOLUTION

Granting the consent of Congress to the Mutual Aid Agreement between the city of Bristol, Virginia, and the city of Bristol, Tennessee.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. CONGRESSIONAL CONSENT.

The Congress consents to the Mutual Aid Agreement entered into between the city of Bristol, Virginia, and the city of Bristol, Tennessee. The agreement reads as follows:

"THIS MUTUAL AID AGREEMENT, made and entered into by and between the CITY OF BRISTOL VIRGINIA, a municipality incorporated under the laws of the Commonwealth of Virginia (hereinafter 'Bristol Vir-

ginia'); and the CITY OF BRISTOL TENNESSEE, a municipality incorporated under the laws of the State of Tennessee (hereinafter 'Bristol Tennessee').

"WITNESSETH:

"WHEREAS, Section 15.1–131 of the Code of Virginia and Sections 6–54–307 and 12–9–101 et seq. of the Tennessee Code Annotated authorize Bristol Virginia and Bristol Tennessee to enter into an agreement providing for mutual law enforcement assistance;

"WHEREAS, the two cities desire to avail themselves of the authority conferred by these respective laws;

"WHEREAS, it is the intention of the two cities to enter into mutual assistance commitments with a pre-determined plan by which each city might render aid to the other in case of need, or in case of an emergency which demands law enforcement services to a degree beyond the existing capabilities of either city; and,

"WHEREAS, it is in the public interest of each city to enter into an agreement for mutual assistance in law enforcement to assure adequate protection for each city.

"NOW, THEREFORE, for and in consideration of the mutual promises and the benefits to be derived therefrom, the City of Bristol Virginia and the City of Bristol Tennessee agree as follows:

"1. Each city will respond to calls for law enforcement assistance by the other city only upon request for such assistance made by the senior law enforcement officer on duty for the requesting city, or his designee, in accordance with the terms of this Agreement. All requests for law enforcement assistance shall be directed to the senior law enforcement officer on duty for the city from which aid is requested.

"2. Upon request for law enforcement assistance as provided in Paragraph 1, the senior law enforcement officer on duty in the responding city will authorize a response as follows:

"a. The responding city will attempt to provide at least the following personnel and equipment in response to the request:

"(1) A minimum response of one vehicle and one person.

"(2) A maximum response of fifty percent (50%) of available personnel and resources.

"b. The response will be determined by the severity of the circumstances in the requesting city which prompted such request as determined by the senior law enforcement officer on duty in

the responding city after discussion with the senior law enforcement officer on duty in the requesting city. Any decision reached by such senior officer of the responding city as to such response shall be final.

"c. If an emergency exists in the responding city at the time the request is made, or if such an emergency occurs during the course of responding to a request under this Agreement, and if the senior law enforcement officer on duty in the responding city reasonably determines, after a consideration of the severity of the emergency in his jurisdiction, that the responding city cannot comply with the minimal requirements under this Agreement without endangering life or incurring significant property damage in his city, or both, he may choose to use all equipment and personnel in his own jurisdiction. In such event, such officer of the responding city shall immediately attempt to inform the senior law enforcement officer on duty in the requesting city of his decision.

"3. The city which requests mutual aid under this Agreement shall not be deemed liable or responsible for the equipment and other personal property

of personnel of the responding city which might be lost, stolen or damaged during the course of responding under the terms of this Agreement.

"4. The city responding to a request for mutual aid under this Agreement assumes all liabilities and responsibility as between the two cities for damage to its own equipment and other personal property. The responding city also assumes all liability and responsibility, as between the two cities, for any damage caused by its own equipment and/or the negligence of its personnel occurring outside the jurisdiction of the requesting city while en route thereto pursuant to a request for assistance under this Agreement, or while returning therefrom.

"5. The city responding under this Agreement assumes no responsibility or liability for damage to property or injury to any person that may occur due to actions taken in responding under this Agreement; all such liability and responsibility shall rest solely with the city requesting such aid and within which boundaries the property exists or the incident occurs, and the requesting party hereby assumes all of such liability and responsibility.

"6. Each city hereby waives any and all claims against the other city which may arise out of their

activities in the other city's jurisdiction under this Agreement. To the extent permitted by law, the city requesting assistance under this Agreement shall indemnify and hold harmless the responding city (and its officers, agents and employees) from any and all claims by third parties for property damage or personal injury which may arise out of the activities of the responding city within the jurisdiction of the requesting city under this Agreement.

"7. The city responding to a request for assistance under this Agreement assumes no responsibility or liability for damage to property or injury to any person that may occur within the jurisdiction of the requesting city due to actions taken in responding under this Agreement. In accordance with Section 15.1–131 of the Code of Virginia and Section 29–20–107(f) of the Tennessee Code Annotated, all personnel of the responding city shall, during such time as they providing assistance in the requesting city under this Agreement, be deemed to be employees of the requesting city for tort liability purposes.

"8. No compensation will be due or paid by either city for mutual aid law enforcement assistance rendered under this Agreement.

"9. Except as provided in Paragraph 7 of this Agreement, neither city will make any claim for compensation against the other city for any loss, damage or personal injury which may occur as a result of law enforcement assistance rendered under this Agreement, and all such rights or claims are hereby expressly waived.

"10. When law enforcement assistance is rendered under this Agreement, the senior law enforcement officer on duty in the requesting city shall in all instances be in command as to strategy, tactics and overall direction of the operations. All orders or directions regarding the operations of the responding party shall be relayed to the senior law enforcement officer in command of the responding city.

"11. Either city may terminate this Agreement upon sixty (60) days' written notice to the other city.

"12. This Agreement shall take effect upon its execution by the Mayor and Chief of Police for each city after approval of the City Council of each city, and upon its approval by the Congress of the United States as provided in Section 15.1–131 of the Code Of Virginia. Each city will promptly submit this

Agreement to its respective Congressman and Senators for submission to the Congress.".

SEC. 2. RIGHT TO ALTER, AMEND, OR REPEAL.

The right to alter, amend, or repeal this joint resolution is hereby expressly reserved by the Congress. The consent granted by this joint resolution shall not be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of the agreement.

SEC. 3. CONSTRUCTION AND SEVERABILITY.

It is intended that the provisions of this agreement shall be reasonably and liberally construed to effectuate the purposes thereof. If any part or application of this agreement, or legislation enabling the agreement, is held invalid, the remainder of the agreement or its application to other situations or persons shall not be affected.

○

Mr. GEKAS. As everyone knows, when two or more States enter into agreements on common issues, the Constitution of the United States prescribes a rule for the Congress. The Congress must approve such agreements after each State in its own way agrees to whatever arrangements they want to pursue.

So with that in mind, I would like the gentleman from Virginia and the gentleman from Tennessee to come to the witness table so they can describe the particularities of the Bristol compact which may go down in history as one the great compacts that has ever been approved by the Congress.

With that, we recognize the gentleman from Virginia, Mr. Boucher.

STATEMENT OF HON. RICK BOUCHER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. BOUCHER. Thank you very much, Mr. Chairman.

I appreciate your inviting my friend and colleague, Congressman Quillen from the First District of Tennessee and me to testify this morning on H.J. Res. 166, which we have jointly introduced and offered for the consideration of the subcommittee.

I have a prepared written statement, and I would ask that be made a part of the record.

Mr. GEKAS. Without objection, it will become part of record.

Mr. BOUCHER. I will offer just a few comments concerning this joint resolution. We together represent the cities of Bristol, VA, and Bristol, TN, a metropolitan area that is divided by a State line, with approximately one-half of the population of the cities in Virginia and one-half in Tennessee.

Each city is separately incorporated under the laws of its respective State and each has its own local government. Each provides municipal services to its citizens.

From time to time, one city experiences the need to call upon the law enforcement assistance of the other city in unusual circumstances. But technically, the officers of one city have no authority to operate in the other city. And that absence of technical, legal authority could prove objectionable in the event that an arrest or other official action takes place.

And territorially to remedy that problem, the city council of both cities have constructed, and then by formal resolution, adopted an agreement which would set forth the terms and conditions under which one city could request and the other city could then provide law enforcement assistance in these special circumstances.

Because the agreement is between the local governments of two separate States, congressional approval is required as a condition of effectiveness after the agreement. Beyond that, the agreement itself provides that it will only be effective upon congressional approval. And the code of Virginia also expressly requires that any agreement between, one, the local government, the State of Virginia and a governmental entity in any other State, will only be effective upon congressional ratification.

My good friend, Mr. Quillen, and I have introduced this resolution. We are urging that it receive the favorable consideration of this subcommittee.

I would be pleased to answer any questions you have after my friend Mr. Quillen has made his remarks.

[The prepared statement of Mr. Boucher follows:]

PREPARED STATEMENT OF HON. RICK BOUCHER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. Chairman, I would like to thank you for calling today's hearing on H.J. Res. 166, legislation that I introduced with Mr. Quillen of Tennessee to allow law enforcement officers in the cities of Bristol, Virginia and Bristol, Tennessee, when requested by the adjoining city, to cross state lines in the performance of their duties and operate with full authorization in the adjoining city once there.

The two cities of Bristol, which we represent, are separated only by the Virginia/Tennessee state line, and therefore, share many common interests. Under current law, police officers from Bristol, Virginia do not have the legal authority to make arrests or perform other law enforcement activities in Tennessee, and their Tennessee counterparts face the same restrictions in Virginia. To address this problem, the two cities of Bristol recently adopted a mutual aid agreement to allow each city to respond to calls for law enforcement assistance made by the other city. The responding city could provide up to a maximum of 50% of the personnel and resources it currently has readily available when responding to a request from the other city.

This mutual aid agreement has been entered into by Bristol, Virginia and Bristol, Tennessee pursuant to each of their respective state's statutes enabling such agreements, and the agreement complies with the statutes of both states. The legislation that you are considering today is necessary to ratify the mutual aid agreement because it is an interstate compact and, therefore, requires approval by the Congress. In addition, Section 15.1–131 of the 1950 *Code of Virginia*, as amended, also expressly requires Congressional approval for multi-state agreements to which Virginia or one of its localities is a party.

I am hopeful that the Subcommittee will act favorably on the legislation and forward it to the full Committee for consideration and passage. Your assistance in this matter is greatly appreciated.

Mr. GEKAS. We now recognize the gentleman from Tennessee, Mr. Quillen, who has promised he will give to me the legacy of asking for votes on the floor of the House with as loud a voice as I can muster an utterance, which he has mastered over the years.

I thank you for that. We hate to see you leave, but I will take up the work of bringing a valid vote on the floor.

STATEMENT OF HON. JAMES H. QUILLEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mr. QUILLEN. Thank you, Mr. Chairman.

I will turn the job over to you after I leave.

I am delighted to be here this morning and join my friend Rick Boucher on behalf of this legislation. And I am on the Tennessee side, Rick is on the Virginia side, and the line separating the two cities goes down in the center of State Street, dividing the two cities. And if there is a crime on one side and the culprit crosses to the other side, I think we need joint authority to do what we have to do in curbing the crime, and for the benefit of the Tennessee law enforcement agencies, as well as Virginia law enforcement agencies.

It makes sense to me. I am happy to be a cosponsor with my good friend, Rick Boucher, on behalf of this legislation.

I would request that this subcommittee report it out so we can pave a new avenue of crimefighting and joint efforts between the State of Virginia, or the city of Virginia and the city of Bristol, Tennessee.

Mr. Chairman, I have a prepared statement, and join Mr. Boucher in everything that he said, because he envisioned this legislation.

For the 34 years that I have been in the Congress, I don't know why I didn't come up with it earlier, but my congratulations to you, Rick, for doing this. And I am happy to be with you.

Mr. BOUCHER. Thank you.

Mr. GEKAS. We thank the gentlemen.

Without objection, his statement will be part of the record.

[The prepared statement of Mr. Quillen follows:]

PREPARED STATEMENT OF HON. JOHN H. QUILLEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Thank you, Mr. Chairman, for holding this hearing on the resolution to grant congressional approval to the mutual aid agreement between the City of Bristol, Virginia and the City of Bristol, Tennessee.

I also want to thank my good friend from Virginia, Mr. Boucher, for introducing this legislation, and I'm happy to be a cosponsor. It's always a pleasure to join hands with Rick on matters that affect our adjoining districts.

The Virginia/Tennessee State line cuts right across State Street in Bristol, which is the city's main thoroughfare. Needless to say, there's a great deal of activity along this street, and unfortunately, some of it is criminal activity. There is often jurisdictional confusion and restrictions on law enforcement personnel caused by the location of the State line.

As Rick explained, this legislation will allow each city to respond to requests for law enforcement assistance made by the other city. This agreement is authorized under Tennessee and Virginia law, and I hope we can get this resolution approved by both Houses and signed into law without delay. The citizens of Bristol deserve the best police protection available, and this mutual aid agreement will accomplish that goal.

Mr. GEKAS. Does anyone of the committee wish to question our colleagues?

Mr. REED. I just want to commend both Mr. Quillen and Boucher for their efforts, they have made a compelling case and I hope we can move it expeditiously.

Mr. GEKAS. Mr. Nadler.

Mr. NADLER. I would like to echo that, and commend the two of you. I assume from your statement—let me ask Rick—that the two city councils have approved this, but the legislatures have not, and I assume that is not necessary?

Mr. BOUCHER. That is correct, the two city councils have ratified this agreement by formal action by both bodies, and action by the State legislature of either State is not required.

Mr. NADLER. Thank you.

Mr. GEKAS. We thank you. And we pledge to you the fast movement of this legislation through subcommittee to try to get it to the Floor so we can pass it before the summer recess.

Mr. BOUCHER. Thank you very much.

Mr. GEKAS. You are excused with our thanks.

Mr. QUILLEN. Vote.

Mr. GEKAS. Vote.

Now turn to H.J. Res. 113, this being a compact between the States of Maryland and West Virginia.

As we heard, the Virginia situation concerned law enforcement, this one, as you will hear from the testimony of our stellar witnesses, concerns recreational and other joint activities.

But the same problems persist, the two States having joint interest in this recreational vista requires the testimony they are about to give and the approval of Congress, pursuant to the Constitution.

[The bill, H.J. Res. 113, follows:]

IA

104TH CONGRESS
1ST SESSION

H. J. RES. 113

Granting the consent of Congress to the compact to provide for joint natural resource management and enforcement of laws and regulations pertaining to natural resources and boating at the Jennings Randolph Lake Project lying in Garrett County, Maryland, and Mineral County, West Virginia, entered into between the States of West Virginia and Maryland.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 17, 1995

Mr. MOLLOHAN (for himself and Mr. BARTLETT of Maryland) introduced the following joint resolution; which was referred to the Committee on the Judiciary

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JOINT RESOLUTION

Granting the consent of Congress to the compact to provide for joint natural resource management and enforcement of laws and regulations pertaining to natural resources and boating at the Jennings Randolph Lake Project lying in Garrett County, Maryland, and Mineral County, West Virginia, entered into between the States of West Virginia and Maryland.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. CONGRESSIONAL CONSENT.

The Congress hereby consents to the Jennings Randolph Lake Project Compact entered into between the States of West Virginia and Maryland which compact is substantially as follows:

"COMPACT

"Whereas the State of Maryland and the State of West Virginia, with the concurrence of the United States Department of the Army, Corps of Engineers, have approved and desire to enter into a compact to provide for joint natural resource management and enforcement of laws and regulations pertaining to natural resources and boating at the Jennings Randolph Lake Project lying in Garrett County, Maryland and Mineral County, West Virginia, for which they seek the approval of Congress, and which compact is as follows:

"Whereas the signatory parties hereto desire to provide for joint natural resource management and enforcement of laws and regulations pertaining to natural resources and boating at the Jennings Randolph Lake Project lying in Garrett County, Maryland and Mineral County, West Virginia, for which they have a joint responsibility; and they declare as follows:

"1. The Congress, under Public Law 87–874, authorized the development of the Jennings Randolph Lake Project for the North Branch of the Potomac River substantially in accordance with House Document Number 469, 87th Congress, 2nd Session

for flood control, water supply, water quality, and recreation; and

"2. Section 4 of the Flood Control Act of 1944 (Ch 665, 58 Stat. 534) provides that the Chief of Engineers, under the supervision of the Secretary of War (now Secretary of the Army), is authorized to construct, maintain and operate public park and recreational facilities in reservoir areas under control of such Secretary for the purpose of boating, swimming, bathing, fishing, and other recreational purposes, so long as the same is not inconsistent with the laws for the protection of fish and wildlife of the State(s) in which such area is situated; and

"3. Pursuant to the authorities cited above, the U.S. Army Engineer District (Baltimore), hereinafter 'District', did construct and now maintains and operates the Jennings Randolph Lake Project; and

"4. The National Environmental Policy Act of 1969 (P.L. 91–190) encourages productive and enjoyable harmony between man and his environment, promotes efforts which will stimulate the health and welfare of man, and encourages cooperation with State and local governments to achieve these ends; and

"5. The Fish and Wildlife Coordination Act (16 U.S.C. 661–666c) provides for the consideration and coordination with other features of water-resource development programs through the effectual and harmonious planning, development, maintenance, and coordination of wildlife conservation and rehabilitation; and

"6. The District has Fisheries and Wildlife Plans as part of the District's project Operational Management Plan; and

"7. In the respective States, the Maryland Department of Natural Resources (hereinafter referred to as 'Maryland DNR') and the West Virginia Division of Natural Resources (hereinafter referred to as 'West Virginia DNR') are responsible for providing a system of control, propagation, management, protection, and regulation of natural resources and boating in Maryland and West Virginia and the enforcement of laws and regulations pertaining to those resources as provided in Annotated Code of Maryland Natural Resources Article and West Virginia Chapter 20, respectively, and the successors thereof; and

"8. The District, the Maryland DNR, and the West Virginia DNR are desirous of conserving, per-

petuating and improving fish and wildlife resources and recreational benefits of the Jennings Randolph Lake Project; and

"9. The District and the States of Maryland and West Virginia wish to implement the aforesaid acts and responsibilities through this Compact and they each recognize that consistent enforcement of the natural resources and boating laws and regulations can best be achieved by entering this Compact:

"Now, therefore, be it *Resolved,* That the States of Maryland and West Virginia, with the concurrence of the United States Department of the Army, Corps of Engineers, hereby solemnly covenant and agree with each other, upon enactment of concurrent legislation by The Congress of the United States and by the respective state legislatures, to the Jennings Randolph Lake Project Compact, which consists of this preamble and the articles that follow:

"Article I—Name, Findings, and Purpose

"1.1 This compact shall be known and may be cited as the Jennings Randolph Lake Project Compact.

"1.2 The legislative bodies of the respective signatory parties, with the concurrence of the U.S. Army Corps of Engineers, hereby find and declare:

"1. The water resources and project lands of the Jennings Randolph Lake Project are affected with local, state, regional, and national interest, and the planning, conservation, utilization, protection and management of these resources, under appropriate arrangements for intergovernmental cooperation, are public purposes of the respective signatory parties.

"2. The lands and waters of the Jennings Randolph Lake Project are subject to the sovereign rights and responsibilities of the signatory parties, and it is the purpose of this compact that, notwithstanding any boundary between Maryland and West Virginia that preexisted the creation of Jennings Randolph Lake, the parties will have and exercise concurrent jurisdiction over any lands and waters of the Jennings Randolph Lake Project concerning natural resources and boating laws and regulations in the common interest of the people of the region.

"Article II—District Responsibilities

"The District, within the Jennings Randolph Lake Project,

"2.1 Acknowledges that the Maryland DNR and West Virginia DNR have authorities and responsibilities in the establishment, administration and enforcement of the natural resources and boating laws and regulations applicable to this project, provided that the laws and regula-

tions promulgated by the States support and implement, where applicable, the intent of the Rules and Regulations Governing Public Use of Water Resources Development Projects administered by the Chief of Engineers in Title 36, Chapter RI, Part 327, Code of Federal Regulations,

"2.2 Agrees to practice those forms of resource management as determined jointly by the District, Maryland DNR and West Virginia DNR to be beneficial to natural resources and which will enhance public recreational opportunities compatible with other authorized purposes of the project,

"2.3 Agrees to consult with the Maryland DNR and West Virginia DNR prior to the issuance of any permits for activities or special events which would include, but not necessarily be limited to: fishing tournaments, training exercises, regattas, marine parades, placement of ski ramps, slalom water ski courses and the establishment of private markers and/or lighting. All such permits issued by the District will require the permittee to comply with all State laws and regulations,

"2.4 Agrees to consult with the Maryland DNR and West Virginia DNR regarding any recommendations for regulations affecting natural resources, including, but not limited to, hunting, trapping, fishing or boating at the Jennings Randolph Lake Project which the District be-

lieves might be desirable for reasons of public safety, administration of public use and enjoyment,

"2.5 Agrees to consult with the Maryland DNR and West Virginia DNR relative to the marking of the lake with buoys, aids to navigation, regulatory markers and establishing and posting of speed limits, no wake zones, restricted or other control areas and to provide, install and maintain such buoys, aids to navigation and regulatory markers as are necessary for the implementation of the District's Operational Management Plan. All buoys, aids to navigation and regulatory markers to be used shall be marked in conformance with the Uniform State Waterway Marking System,

"2.6 Agrees to allow hunting, trapping, boating and fishing by the public in accordance with the laws and regulations relating to the Jennings Randolph Lake Project,

"2.7 Agrees to provide, install and maintain public ramps, parking areas, courtesy docks, etc., as provided for by the approved Corps of Engineers Master Plan, and

"2.8 Agrees to notify the Maryland DNR and the West Virginia DNR of each reservoir drawdown prior thereto excepting drawdown for the reestablishment of normal lake levels following flood control operations and drawdown resulting from routine water control management operations described in the reservoir regulation man-

ual including releases requested by water supply owners and normal water quality releases. In case of emergency releases or emergency flow curtailments, telephone or oral notification will be provided. The District reserves the right, following issuance of the above notice, to make operational and other tests which may be necessary to insure the safe and efficient operation of the dam, for inspection and maintenance purposes, and for the gathering of water quality data both within the impoundment and in the Potomac River downstream from the dam.

"Article III—State Responsibilities

"The State of Maryland and the State of West Virginia agree:

"3.1 That each State will have and exercise concurrent jurisdiction with the District and the other State for the purpose of enforcing the civil and criminal laws of the respective States pertaining to natural resources and boating laws and regulations over any lands and waters of the Jennings Randolph Lake Project;

"3.2 That existing natural resources and boating laws and regulations already in effect in each State shall remain in force on the Jennings Randolph Lake Project until either State amends, modifies or rescinds its laws and regulations;

"3.3 That the Agreement for Fishing Privileges dated June 24, 1985 between the State of Maryland and the State of West Virginia, as amended, remains in full force and effect;

"3.4 To enforce the natural resources and boating laws and regulations applicable to the Jennings Randolph Lake Project;

"3.5 To supply the District with the name, address and telephone number of the person(s) to be contacted when any drawdown except those resulting from normal regulation procedures occurs;

"3.6 To inform the Reservoir Manager of all emergencies or unusual activities occurring on the Jennings Randolph Lake Project;

"3.7 To provide training to District employees in order to familiarize them with natural resources and boating laws and regulations as they apply to the Jennings Randolph Lake Project; and

"3.8 To recognize that the District and other Federal Agencies have the right and responsibility to enforce, within the boundaries of the Jennings Randolph Lake Project, all applicable Federal laws, rules and regulations so as to provide the public with safe and healthful recreational opportunities and to provide protection to all federal property within the project.

"Article IV—Mutual Cooperation

"4.1 Pursuant to the aims and purposes of this Compact, the State of Maryland, the State of West Virginia and the District mutually agree that representatives of their natural resource management and enforcement agencies will cooperate to further the purposes of this Compact. This cooperation includes, but is not limited to, the following:

"4.2 Meeting jointly at least once annually, and providing for other meetings as deemed necessary for discussion of matters relating to the management of natural resources and visitor use on lands and waters within the Jennings Randolph Lake Project;

"4.3 Evaluating natural resources and boating, to develop natural resources and boating management plans and to initiate and carry out management programs;

"4.4 Encouraging the dissemination of joint publications, press releases or other public information and the interchange between parties of all pertinent agency policies and objectives for the use and perpetuation of natural resources of the Jennings Randolph Lake Project; and

"4.5 Entering into working arrangements as occasion demands for the use of lands, waters, construction and use of buildings and other facilities at the project.

"Article V—General Provisions

"5.1 Each and every provision of this Compact is subject to the laws of the States of Maryland and West Virginia and the laws of the United States, and the delegated authority in each instance.

"5.2 The enforcement and applicability of natural resources and boating laws and regulations referenced in this Compact shall be limited to the lands and waters of the Jennings Randolph Lake Project, including but not limited to the prevailing reciprocal fishing laws and regulations between the States of Maryland and West Virginia.

"5.3 Nothing in this Compact shall be construed as obligating any party hereto to the expenditure of funds or the future payment of money in excess of appropriations authorized by law.

"5.4 The provisions of this Compact shall be severable, and if any phrase, clause, sentence or provision of the Jennings Randolph Lake Project Compact is declared to be unconstitutional or inapplicable to any signatory party or agency of any party, the constitutionality and applicability of the Compact shall not be otherwise affected as to any provision, party, or agency. It is the legislative intent that the provisions of the Compact be reasonably and liberally construed to effectuate the stated purposes of the Compact.

"5.5 No member of or delegate to Congress, or signatory shall be admitted to any share or part of this Compact, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this agreement if made with a corporation for its general benefit.

"5.6 When this Compact has been ratified by the legislature of each respective State, when the Governor of West Virginia and the Governor of Maryland have executed this Compact on behalf of their respective States and have caused a verified copy thereof to be filed with the Secretary of State of each respective State, when the Baltimore District of the U.S. Army Corps of Engineers has executed its concurrence with this Compact, and when this Compact has been consented to by the Congress of the United States, then this Compact shall become operative and effective.

"5.7 Either State may, by legislative act, after one year's written notice to the other, withdraw from this Compact. The U.S. Army Corps of Engineers may withdraw its concurrence with this Compact upon one year's written notice from the Baltimore District Engineer to the Governor of each State.

"5.8 This Compact may be amended from time to time. Each proposed amendment shall be presented in resolution form to the Governor of each State and the Balti-

more District Engineer of the U.S. Army Corps of Engineers. An amendment to this Compact shall become effective only after it has been ratified by the legislatures of both signatory States and concurred in by the U.S. Army Corps of Engineers, Baltimore District. Amendments shall become effective thirty days after the date of the last concurrence or ratification.".

SEC. 2. The right to alter, amend or repeal this joint resolution is hereby expressly reserved. The consent granted by this joint resolution shall not be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of the compact.

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Mr. GEKAS. We are honored to have with us as witnesses the senior Senator from Maryland, Paul Sarbanes; the gentleman from Maryland, Mr. Bartlett; and gentleman from West Virginia, Mr. Mollohan, and his guest.

But without further ado, we will turn to Senator Sarbanes to proceed to describe the nature of the issue.

STATEMENT OF HON. PAUL SARBANES, A SENATOR IN CONGRESS FROM THE STATE OF MARYLAND

Mr. SARBANES. Mr. Chairman and members of the committee, thank you very much.

I am pleased to be here with Congressman Mollohan and my colleague in Maryland, Congressman Bartlett. We have passed in the Senate and sent over to the House, H.J. Res. 20, which was introduced by Senators Mikulski, Byrd, Rockefeller, and myself. A companion measure was induced to the House by Representatives Mollohan and Bartlett, H.J. Res. 113, this would grant congressional consent for a compact of management and law enforcement at the Jennings Randolph Lake.

The Senate actually unanimously approved this right at the end the last session of the Congress in 1994, too late for any further action; then again last fall in 1995. I hope we can move to enact this important measure to provide protection for the visiting public in the areas of natural resources.

We have got a couple of maps here; I have many pictures prepared by the Corps of Engineers who do a very good job, as you know.

The Bloomington Dam was constructed here, it backed up the water here and created a major lake, 6.6 miles long, a surface area of 952 acres. The construction of the dam was authorized by the Flood Control Act of 1962. It was designed to improve the water quality of the Potomac River, reduce flood damage for the communities in the north branch of the Potomac River Basin, provide municipal water supply for the Washington metropolitan area, eventually this water makes it down to Washington, as it is important for the water supply here.

This dam is important to control the water flow and to create opportunities for recreation. It is in Garrett County, MD, Mineral County, WV, and the State line runs through the lake, and that is one of the problems, as I am going to point out to you in just a second.

We have some wonderful recreational facilities along the side of this lake and we need some help here now in controlling how they are used.

This is just another picture that gives you a view of the dam here and then the lake backed up behind it. There are currently five recreational sites at the Jennings Randolph Lake. It was originally called Bloomington Lake, then renamed and rededicated in honor of former Senator Jennings Randolph in West Virginia. I was at that ceremony when that took place and I know it a meant great deal to Jennings Randolph.

There are five recreational sites, including a campground, boat launch, and picnic area on the West Virginia side of the lake, and a new boat launch on Maryland side, which will become operational

later this year. The fishing, boating and other exceptional recreational opportunities afforded by the lake are drawing an ever-increasing number of visitors, and there has been a 24-percent increase in visitation over the past year; boating has increased by 42 percent; fishing by 14 percent.

Now what happened and why we need the compact is the creation of the lake removed the natural boundary between West Virginia and Maryland, and the meandering nature of the former river and the depth of the lake made it impossible to establish the precise location.

In other words, here is this lake that now covers up what used to be the boundary line, so you don't know exactly on the lake where the line is between West Virginia and Maryland. The lack of an identifiable boundary has raised serious jurisdictional questions, making enforcement of natural resources and boating laws difficult at best.

As recreational uses of the lake continue to increase, it is anticipated that the enforcement problems will significantly worsen. In fact, you are going to hear shortly from natural resources law enforcement officials from Maryland and West Virginia who can describe in greater detail some of the problems they are experiencing. But I want to share with you two examples of boating violations which the States are seeking to address.

The first shows a picture of a power boat. You can see it right back here; traveling at a very high speed in a no-wake zone, in other words, clearly violating the requirements. And moments after the picture was taken, it nearly swamped this sailboat that is sitting out here.

And in the second picture, according to the local officials—let me read what they wrote on the back of this thing: "This photograph portrayed the rowdyism and free-wheeling attitude exhibited by many of the younger visitors to the project. All four individuals were obviously inebriated, although at least two were underage. They were operating the boat in a reckless and negligent manner, intimidating other boaters on the lake."

The compact legislation that is before you would provide the States of Maryland and West Virginia with current jurisdiction over the project to enable them to enforce natural resource and boating laws and regulations.

The States have been working in concert actually to harmonize their laws and regulations, and I gather that has either been accomplished or about to be accomplished, so they are in complete harmony. This approach eliminates the need to undertake some effort to redefine the boundary between the two States for law enforcement purposes.

As required before congressional action can be taken, the compact was approved by the Legislatures of Maryland and West Virginia in the 1993 and 1994 legislative session, respectively. Legislation is strongly supported by the U.S. Army Corps of Engineers.

And I submit for the record a letter from the Baltimore district engineer, Colonel Inouye.

[The information follows:]

DEPARTMENT OF THE ARMY
BALTIMORE DISTRICT, CORPS OF ENGINEERS
P.O. BOX 1715
BALTIMORE, MARYLAND 21203-1715

Operations Division

SEP 2 0 1994

Honorable Paul S. Sarbanes
United State Senate
Washington, DC 20510

Dear Senator Sarbanes:

This is in reply to your request of September 15, 1994 asking if the Baltimore District supports the Jennings Randolph Lake Project Compact.

Please be assured that we support the compact between the States of Maryland and West Virginia. We welcome the presence and support that this compact will allow each state to direct toward the management of the natural resources and the protection of the visiting public at Jennings Randolph Lake.

We intend to cooperate with both states to ensure a federal and state partnership that will lead to effective and efficient management of our shared resources.

Thank you for your support of this important compact.

Sincerely,

Randall R. Inouye, P.E.
Colonel, Corps of Engineers
District Engineer

Mr. SARBANES. It would be very helpful if the committee could act quickly. We are in the summer season, obviously, which is when a number of these incidents that I have illustrated to you are on the increase.

This has strong support in both States. I know of no opposition or no argument against approval of the compact.

I thank the committee for its attention.

Mr. GEKAS. You don't suggest that we subpoena these four revelers.

Mr. SARBANES. I think it is probably too late at this point.

[The prepared statement of Mr. Sarbanes follows:]

Thank you, Mr. Chairman, for this opportunity to testify on S.J.Res. 20, legislation which I introduced together with Senators Mikulski, Byrd and Rockefeller, and a companion measure sponsored by Representatives Mollohan and Bartlett, H.J.Res. 113, to grant congressional consent to a compact entered into between the States of Maryland and West Virginia for joint management and law enforcement at Jennings Randolph Lake. The Senate unanimously approved this legislation in 1994 and 1995, in the 103rd and 104th Congress, respectively, and I am hopeful that the House can move swiftly to enact this important measure to ensure a full measure of protection for the visiting public and the area's natural resources.

Jennings Randolph Lake is located on the North Branch of the Potomac River in Garrett County, Maryland and Mineral County West Virginia approximately 230 miles upstream of the Washington, D.C. area. Construction of the dam which created the lake was authorized by the Flood Control Act of 1962 and the project was specifically designed to improve the water quality of the Potomac River, reduce flood damages for communities in the North Branch Potomac River basin, provide municipal water supply for the Washington metropolitan area and opportunities for recreation. Completed in 1982, the dam is one the largest dams east of the Mississippi -- approximately 6.6 miles long, with a surface area of 952 acres and a drainage area of 263 square miles. Originally named Bloomington Lake, the project was rededicated in May 1987 in honor of former West Virginia Senator Jennings Randolph.

There are currently five recreational sites at Jennings Randolph including a campground, boat launch and picnic area on the West Virginia side of the lake and a new boat launch on the Maryland side of the project which will become operational later this year. The fishing, boating, and other exceptional recreational opportunities afforded by the lake are drawing an ever increasing number of visitors to the area. In the past two years alone, Jennings Randolph Lake experienced a 24% increase in visitation with over 55,000 visitors in 1995. During that same period boating use has increased by 42% (8,925 to 12, 697) and fishing by 14% (6,442 to 7,376.) Herein lies the problem.

The creation of the lake removed the natural boundary between West Virginia and Maryland and the meandering nature of the former river and the depth of the lake have made it virtually impossible to reestablish the precise location of the boundary. The lack of an identifiable boundary has raised serious jurisdictional questions making enforcement of natural resources and boating laws and regulations difficult and tentative, at best. As recreational uses of the lake continue to increase, it is anticipated that enforcement problems will become increasingly problematic. You will hear shortly from natural resources law enforcement officials from Maryland and West Virginia, who can describe in greater detail some of the problems they are experiencing at the lake, but I wanted to share with you two examples of boating violations which the states are seeking to address. The first picture shows a power boat traveling at high speed in a "no wake" zone which, moments after the picture was taken, nearly swamped the small sailboat. In the second picture, I am advised that at least two of the boaters were underage for consuming alcohol and that the individuals were operating the boat in a reckless and negligent manner, intimidating other boaters on the lake.

The compact legislation before you today would provide the states of Maryland and West Virginia with concurrent jurisdiction over the project to enable them to jointly enforce natural resource and boating laws and regulations. This approach eliminates the need to redefine the boundary between the two States for law enforcement purposes. As required before Congressional action can be taken, the compact was approved by the legislatures of Maryland and West Virginia in their 1993 and 1994 legislative sessions, respectively.

The legislation is strongly supported by the U.S. Army Corps of Engineers and the State of Maryland. I would like to submit for the record letters from Baltimore District Engineer Col. Inouye and from Maryland's Secretary of the Department of Natural Resources, John Griffin, underscoring their support for the project. In order to ensure a full measure of protection for the visiting public and the area's natural resources, I urge the Committee to act swiftly on the legislation.

Mr. GEKAS. We recognize the gentleman from West Virginia, Mr. Mollohan.

STATEMENT OF HON. ALAN B. MOLLOHAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA

Mr. MOLLOHAN. Thank you, Mr. Chairman, Mr. Reed, members of the committee.

I am very pleased to appear today to testify on behalf of H.J. Res. 113, regarding the compact for the management of the Jennings Randolph Lake. I am pleased also to appear with Senator Sarbanes, who is a real leader with regard to this, and my colleague, Congressman Bartlett, who represents Maryland right across the line, and I am pleased to have worked with him on this matter.

Senator Sarbanes has done a truly excellent job of summarizing the issue. Interestingly, the Jennings Randolph Lake, the primary motivation for constructing this project was water quality, as the Senator alluded to and described, in the Washington area.

There is a tower going down into this lake from the surface down to the bottom, which has a capability of mixing water at different levels. And those water levels are measured for—their purity or lack of purity and for their temperature so they can control by opening up valves at different levels, different depths and letting in different water qualities.

They can control the quality of the north branch of the Potomac River, which is what the Bloomington Dam dams up. They can control water quality down through the north fork of the Potomac River, and in the process control the water quality as it comes down through all of those communities into Washington. That was really the impetus behind the project, as Senator Sarbanes graciously noted.

Senator Randolph as well as Senator Byrd were very instrumental in the projects. Senator Randolph being a great promoter of public works—he is still living, by the way, and I know that he would be extremely pleased that the opportunity exists coming out of this initial purpose, opportunity exists for a broader use of the lake, and that is what is happening here.

The water quality mission is being performed admirably and now the recreational opportunity is really growing. As the Senator noted, it is growing very rapidly. That creates a lot of management kind of issues, not only law enforcement issues, as the demonstrative evidence that the Senator introduced lets us see very clearly, but also natural resource management issues, the laws are a bit different on both sides of the lake with regard to law enforcement and local resource management.

The locals have been working together, wonderfully well together to make the compact work successfully, and it is time for the Congress to move and give them—allow them to come to closure on all of these issues.

We very much appreciate the chairman and the committee's interest in it, and we are thrilled with the idea that the compact could move in this session of Congress.

Again, I want to express my appreciation for making this opportunity available to appear and speak on behalf of the legislation.

Mr. GEKAS. We thank the gentleman.

And we turn to our colleague from Maryland, Roscoe Bartlett.

STATEMENT OF HON. ROSCOE G. BARTLETT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. BARTLETT. Thank you very much, and I would ask that the full text of my remarks might be included in the record.

Mr. GEKAS. Without objection, the statements of all the witnesses will be accepted for the record.

Mr. BARTLETT. Thank you. I will make a few brief remarks.

Mr. Chairman and members of the committee, I appreciate the opportunity to appear before you today in fulfillment of our constitutional duty to review and approve a compact between two States, in this case, the States of Maryland and West Virginia. I carry a copy of the Constitution with me and find it essential to the legislative process.

I note in the Constitution of the United States, article I, section 10, that it states, "no State shall without the consent of Congress enter into any agreement or compact with another State," thus the reason for our appearance today.

H.J. Res. 113, which is before you today, presents the desire of two States, Maryland and West Virginia, to work together in the best interest of managing the Jennings Randolph Lake Project located in Garrett County, MD, and Mineral County, WV.

Senator Sarbanes mentioned some uncertainty about State boundaries. We have a very interesting situation here, unlike most States which are separated by a river, the State boundary does not go down the middle of the Potomac River; Maryland owns the Potomac River.

Does that mean when we dam up the Potomac River and make it larger, does Maryland get bigger and West Virginia get smaller? So there are obviously some uncertainties about State boundaries here since the Potomac River is owned by Maryland and not half of it owned by West Virginia.

As with our national wildlife refuges, the Jennings Randolph Lake Project can be a source of continuing enjoyment for this and generations to come; for young and old who enjoy boating, swimming, fishing, and other wholesome outdoor activities. At the same time, the lake and its environment can contribute to this Nation's network of land and water whose purpose in concert with recreational use is to provide a conservation resource for fish, wildlife populations and plants.

Mr. Chairman, I would ask that your committee look favorably on H.J. Res. 113, and see that this resolution is favorably reported to the full House for a floor vote. This resolution was introduced October 17, 1995, and has been passed by Senate. The States of Maryland and West Virginia are waiting to do their part in implementing this important compact.

Thank you very much for the privilege of testifying.

[The prepared statement of Mr. Bartlett follows:]

PREPARED STATEMENT OF ROSCOE G. BARTLETT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. Chairman, and members of the Committee, I appreciate the opportunity to appear before you today in fulfillment of our Constitutional duty to review and to

approve a compact between two states—in this case the States of Maryland and West Virginia. I carry a copy of the Constitution with me and find it essential to the legislative process. I note that in the Constitution of the United States, Article I, Section 10 it states:

> *No State shall, without the Consent of Congress,* lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, *enter into any Agreement or Compact with another State,* or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay. (Emphasis supplied.)

H.J. Res. 113 which is before you today, presents the desire of two States—Maryland and West Virginia—to work together in the best interests of managing the Jennings Randolph Lake Project located in Garrett County, Maryland and in Mineral County, West Virginia. Congressional approval is required so that the States of Maryland and West Virginia by interstate compact may engage in a cooperative effort of natural resource conservation and preservation of this lake for the enjoyment of the inhabitants of both States and as a scenic and recreation asset for the nation as whole.

These are not incompatible objectives if the States and the United States Corps of Engineers join together in providing reasonable and consistent regulation of boating, fishing and other recreational activities. Through foresight and cooperation water resource development programs can be devised that harmonize recreational activities with the planning, development, maintenance, and coordination of wildlife conservation and rehabilitation.

It is important to note that Congress in passing the Flood Control Act of 1944 recognized the beneficial, dual use of public works for flood control by authorizing the Secretary of the Army "to construct, maintain and operate public park and recreational facilities in reservoir areas . . . for the purpose of boating, swimming, bathing, fishing, and other recreational purposes, so long as the same is not inconsistent with the laws for the protection of fish and wildlife of the State(s) in which such area is situated."

As with our National Wildlife Refuges, the Jennings Randolph Lake Project can be a source of continuing enjoyment—for this and generations to come—for young and old—who enjoy boating, swimming, fishing and other wholesome, outdoor recreational activities. At the same time, the lake and its environ can contribute to this nation's network of lands and waters whose purpose, in concert with recreational use, is to provide a conservation resource for fish, wildlife populations, and plants.

The two States and the United States Corps of Engineers in their cooperative venture should follow the guidance of the "National Environmental Policy Act of 1969" (P.L. 91–190) which—as contained in H.J. Res. 113—"encourages productive and enjoyable harmony between man and his environment," and the promotion of activities "which will stimulate the health and welfare of man."

Mr. Chairman, I would ask that your Committee look favorably on H.J. Res. 113 and see that this resolution is favorably reported to the full House for a floor vote. This resolution was introduced October 17, 1995 and has been passed by the Senate. The States of Maryland and West Virginia are waiting to do their part in implementing this important compact.

Mr. GEKAS. By all means.

Does any member of the subcommittee wish to question any of the witnesses?

Mr. REED. No questions.

I just to thank the witnesses for their excellent testimony and assure them we will move as quickly as possible with the help of the chairman.

Mr. GEKAS. Mr. Nadler.

With that, we thank the panel. We do pledge we will move it as expeditiously as possible.

Will Senator Sarbanes please inform Senator Byrd that West Virginia will not be smaller following the enactment of that compact?

Mr. SARBANES. I very much doubt Senator Byrd ever really worried about that.

Mr. GEKAS. Thank you very much.

The next panel on the same subject matter will consist of Herbert Sachs, the executive director of the Interstate Commission on the Potomac River Basin; Lt. Col. Thomas Turner, deputy superintendent of the Maryland Natural Resources Police; and Maj. William B. Daniel, assistant chief of the Law Enforcement Section, Department of Natural Resources, State of West Virginia.

We will entertain their testimony in the order in which I announce their names. We will tell them ahead of time that their written statements, if any, will be accepted for the record without objection.

We will invite Mr. Sachs to begin the verbal testimony.

STATEMENT OF HERBERT M. SACHS, EXECUTIVE DIRECTOR, INTERSTATE COMMISSION ON THE POTOMAC RIVER BASIN

Mr. SACHS. Thank you, Mr. Chairman. Good morning, members of the committee, I am Herbert Sachs, executive director of the Interstate Commission on the Potomac River Basin. The basin includes parts of Maryland, Virginia, Pennsylvania, West Virginia, and the District of Columbia, and all are represented on the commission.

We are very pleased to be participating in the restoration of the north branch of the Potomac River, which for decades was polluted from mining activity and lack of waste treatment. With the construction of the Jennings Randolph Reservoir concurrent efforts by the mining interests and the States of Maryland and West Virginia to correct mine drainage problems, and improve waste treatment of municipal and industrial point sources, the quality of the river has remarkably improved. We now are finding many more uses for the river than what was possible in the past.

I have submitted a written statement for the record, which I understand will be made part of the hearing. I have also submitted an one-page summary statement, which I believe has been distributed as well.

Let me just comment on a few points. The Jennings Randolph Lake began operating in 1982. With improved water quality, recreation use of the lake is expected to increase dramatically. As we provide better access and more facilities, more people will be using that facility.

At the site of its civil works project, the Corps of Engineers turns over the management and enforcement of natural resources and conservation laws to the States. On the Jennings Randolph Project, it is extremely difficult to administer any type of regulations, because as was stated previously, the State boundary which is the river itself was inundated by the lake. The police officers from the two States can't determine the extent of their jurisdiction and are very reluctant to take enforcement action.

H.J. Res. 113 remedies this problem through creation of an interstate compact which allows concurrent jurisdiction for the two States; the police officers from either State can go any place on the project to enforce conservation laws. The consent of Congress for this interstate compact is provided in the resolution. Both States have previously given their approval and the Senate has approved identical legislation earlier this year.

The Corps of Engineers, the State, the local government are now working on uniform regulations for managing the resources activity of the project area. We do need the compact in order to carry out enforcement activity, and respectfully request your assistance.

Thank you, sir.

Mr. GEKAS. We thank you.

[The prepared statement of Mr. Sachs follows:]

PREPARED STATEMENT OF HERBERT M. SACHS, EXECUTIVE DIRECTOR, INTERSTATE COMMISSION ON THE POTOMAC RIVER BASIN

Mr. Chairman, Members of the subcommittee, and staff, I am Herbert M. Sachs, Executive Director of the Interstate Commission on the Potomac River Basin (Commission). I appreciate the opportunity to testify in support of HJR113. With me is Robert Bolle, General Counsel of the Commission, and James Cummins, the Commission's Associate Director for Living Resources, who will assist me in answering questions you may have.

The Commission was created by compact in 1940 and includes membership from the Federal government, Maryland, Pennsylvania, Virginia, West Virginia, and the District of Columbia. Among its activities, the Commission is chairing a task force created by an agreement of the Governors of Maryland and West Virginia that is coordinating the restoration of the North Branch Potomac River. The Jennings Randolph Lake and the surrounding federal area within the project limits are a significant feature of that watershed and crucial to the restoration effort. HJR113 relates to an important aspect of this effort by providing for Congressional approval of the Jennings Randolph Lake Compact (Compact) which addresses the enforcement of conservation and natural resource laws on the lake and adjoining Federal land. The Compact formalizes the agreement between the States of Maryland and West Virginia, with the concurrence of the U.S. Army Corps of Engineers (COE), to provide for joint natural resources management and the enforcement of laws and regulations relating to natural resources and boating in the project area which is located in Garrett County, Maryland and Mineral County West Virginia. Congressional approval of the Compact is required by Article I, Section 10, Clause 3 of the U.S. Constitution pursuant to which states are expressly forbidden from entering into any agreement or compact with other states without the consent of Congress.

The Compact is necessary because of the circumstances surrounding the development of Jennings Randolph Lake. Authorized by the 87th Congress in 1962 as Public Law 87–874, the Project, which is operated and maintained by the COE, became operational in 1982 serving the authorized purposes of flood control, augmentation for water supply and water quality improvement, and recreation. Creation of the lake, along with an effective effort by the mining interests and the States of Maryland and West Virginia to correct mine drainage problems, and improved waste treatment of municipal and industrial point sources, have turned this watershed around. What was once a foul smelling, badly polluted body of water, the North Branch Potomac River has been cleaned-up to the point where it is now providing excellent fisheries and recreational opportunities that many believe will be of significant benefit to in area with a longstanding depressed economy.

At the site of its civil works projects, the COE typically turns the management and enforcement of natural resources laws and regulations over to the states. In the area of the Project, the natural river was the boundary between Maryland and West Virginia. The creation of the Lake obliterated this boundary, which in some places can be as deep as 250 feet of water, bringing into question the law enforcement jurisdiction of the two states. Re-establishing the precise location of the boundary on the Lake would be difficult, if not impossible because of the highly meandering nature of the former river boundary. Because of the jurisdictional questions generated by the lack of an identifiable boundary, enforcement of natural resources and boating laws and regulations on the Lake and Project area has been tentative, and for practical purposes, impossible.

The Jennings Randolph Lake Compact resolves the enforcement problem by providing for the concurrent jurisdiction of the two states over the Project area with respect to such laws and regulations. Such jurisdiction eliminates the need to delineate and physically mark a Maryland West Virginia boundary through the lake before effective law enforcement authority can be established. The Compact has the full, unqualified support of all parties involved. It is a component of the 1993 North Branch Potomac River Water Quality and Recreational Improvement Agreement signed by the Governors of Maryland and West Virginia. The Compact was drafted

through the joint efforts of the two states, the COE and the Commission. It was approved by the Maryland legislature in 1993 and by the West Virginia legislature in 1994. In addition, the Compact was approved by the Senate earlier this year in S.J. Res. 205.

In summary, the Compact is a crucial element for the success of the Jennings Randolph Lake Project, and I urge its approval by your Committee. Until the Compact is passed, the enforcement of natural resources and boating laws and regulations in the Project will remain nonexistent to the detriment of both the public and the management agencies.

This concludes my testimony. I will be happy to answer any questions.

SUMMARY OF H.J. RES. 113—JENNINGS RANDOLPH LAKE PROJECT COMPACT

H.J. Res. 113 gives Congressional consent to the Jennings Randolph Lake Project Compact (Compact) entered into and approved by the States of Maryland and West Virginia with the concurrence of U.S. Army Corps of Engineers (COE) to provide for joint resource management and enforcement of natural resources and boating laws and regulations at the Jennings Randolph Lake Project. (Project) Following is a summary of the Resolution Section 1. Congressional Consent.

SECTION 1. CONGRESSIONAL CONSENT

Preamble

The Preamble sets forth the desire of the signatory parties to enter into the Compact, describes the authority of the parties to enter the Compact and their reasons for doing so, and states the agreement of the two States, with the concurrence of the COE, to the Compact.

Article I—Name, Findings, and Purpose

Article I of the Compact states the Compact's name and the public purposes underlying the agreement. It also describes the purpose of the Compact to be that the parties thereto have and exercise concurrent jurisdiction over the Project, concerning natural resources and boating laws and regulations, not withstanding any boundary preexisting before the Project's creation.

Article II—District Responsibilities

Article II describes the responsibilities of the COE which are to be carried out by the COE Baltimore District. Under this Article, the COE acknowledges the authorities and responsibilities of the Maryland and West Virginia Department of Natural Resources (DNRs) in the establishment, administration and enforcement of natural resources laws and regulations applicable to the Project, provided that the laws and regulations promulgated by the States support and implement the intent of COE regulations governing the Project's public use.

The COE also agrees to consult with the DNRs of the two States prior to the issuance to permits for special events and requires all permits to require the permit tee to comply with all state laws and regulations. In addition, the COE also agrees to consult with the State DNRs regarding recommendations for regulations affecting natural resources at the Project which it believes desirable for public safety, administration for public use, and safety.

Consultation is also to take place with respect to the marking of the Project's lake with buoys, aids to navigation and regulatory markers. In this regard, the COE agrees to provide, install and maintain these items.

The COE also agrees to allow hunting, fishing, boating and trapping in the Project and to provide, install, and maintain public ramps, parking areas, docks and other amenities.

Finally, the COE agrees to provide prior notice of reservoir draw downs to the DNRs except for draw downs to establish normal lake levels after flood control operations and those resulting from routine water control management operations.

Article III—State Responsibilities

Article III describes the responsibilities of the States of Maryland and West Virginia under the Compact. In part, each State agrees that it will have and exercise concurrent jurisdiction with the other States and the COE for the purpose of enforcing the civil and criminal laws of the respective States relating to natural resources and boating laws and regulations over the Project. Each State also agrees to enforce the natural resources and boating laws and regulations relating to the Project and to provide training to COE employees to familiarize them with natural resources and boating laws and regulations as they relate to the Project. Furthermore, each agrees to inform the Project manager of any emergencies of unusual activities occur-

ring on the Project and to supply the COE with the contact person for notifications of draw downs from the lake.

The two States also agree that the existing natural resources and boating laws and regulations already in effect in each State shall remain in force on the Project until either State amends, modifies or rescinds its laws and regulations.

Under this Article, the States also recognize the right and responsibility of the COE and other federal agencies to enforce, within the Project boundaries, all Federal laws, rules, and regulations so as to provide safe and healthful recreational opportunities for the public and to provide for the protection of all Federal property in the Project.

Article IV—Mutual Cooperation

Under this Article, the States and the COE pledge the mutual cooperation of representatives of their natural resources management and enforcement agencies to further the purposes of the Compact. Such cooperation is to include, but is not limited to: 1) an annual meeting, with other meetings as necessary, for discussion of the management of natural resources in the Project; 2) evaluating natural resources and boating and developing and implementing management plans and programs; 3) encouraging joint public information efforts and the free interchange between the parties of all relevant agency policies and objectives relating to the natural resources of the Project; and 4) entering into working arrangements, as necessary for the use of the Project's lands, and waters, and the construction, and use of buildings and other facilities at the Project.

Article V—General Provisions

Under this Article, all provisions of the Compact are deemed subject to the laws of the two States and the United States., and the enforcement and applicability of natural resources and boating laws and regulations covered by the Compact are limited to the lands and waters of the Project.

This Article also provides that the Compact shall not be construed to obligate any party to expenditures in excess of lawfully authorized appropriations. Furthermore, the provisions of the Compact are to be severable for purposes of constitutional interpretation, and the provisions of the Compact are to be reasonably and liberally construed to effectuate the Compact's stated purposes.

Article V also sets forth the procedures for making the Compact effective and operative, for amending the Compact, and for withdrawing from the Compact.

SECTION 2

Under Section 2 of the Resolution, Congress expressly reserves the right to alter, amend or reap peal the Resolution. Furthermore, the consent granted by the Resolution is not to be construed as impairing or in any manner affecting any right or jurisdiction of the U.S. in and over the Project.

FACT SHEET
For The Jennings Randolph Lake Project Compact

I. Description of the Compact

The Jennings Randolph Lake Project Compact (Compact) is an agreement between the States of Maryland and West Virginia, with the concurrence of the U. S. Army Corps of Engineers (Corps), to provide for joint natural resource management and enforcement of laws and regulations relating to natural resources and boating at the Jennings Randolph Lake Project (Project). This project is located in Garrett County, Maryland and Mineral County, West Virginia.

Under the Compact, the signatory states and the Corps recognize their joint responsibility for the management of natural resources and the enforcement of natural resources and boating laws and regulations. In recognition of that joint responsibility, the Compact provides for the concurrent jurisdiction of the signatories over the lands and waters in the Project concerning natural resources and boating laws and regulations, notwithstanding any boundary between Maryland and West Virginia that existed prior to the creation of Jennings Randolph Lake.

II. Need for the Approval of Congress

Under Article I, Section 10, Clause 3 of the U.S. Constitution, states are expressly forbidden from entering into any agreement or compact with other states without the consent of Congress. The Compact described above clearly falls within the scope of this provision and requires the consent of Congress to be effective and enforceable.

III. Background and Explanation

The 87th Congress, under Public Law 87-874, authorized the development of the Jennings Randolph Lake Project for the North Branch of the Potomac River to provide for flood control, water supply, water quality and recreation. Pursuant to this legislation, the Corps (Baltimore District) did construct and now operates and maintains the Project.

Unfortunately, the creation of the Lake obliterated the boundary between Maryland and West Virginia in that area thereby bringing into question the law enforcement jurisdiction of the two states. Re-establishing the precise location of the boundary on the lake area has been difficult and never satisfactorily resolved due to the depth of the Lake and the highly meandering nature of the former river boundary. Consequently, because of the jurisdictional questions generated by the lack of a boundary, enforcement of natural resources and boating laws and regulations in the Project area has been tentative and virtually nonexistent.

The Compact provides for the enforcement of these laws and regulations by establishing the concurrent jurisdiction of the two states over the Project area for purposes of such enforcement. This approach eliminates the need to agree upon and mark a boundary before clear lines of law enforcement authority can be established.

The Compact was adopted by the Maryland legislature in 1993 and by the West Virginia legislature in February, 1994. It is an important element of the North Branch Potomac River Water Quality and Recreation Improvement Agreement signed in 1993 by Governor William Donald Schaefer of Maryland and Governor Gaston Caperton of West Virginia. Without such action by the states, and without the required Congressional approval, it is likely that enforcement of the natural resources and boating laws and regulations in the Project will remain, for practical purposes, nonexistent.

CHRONOLOGICAL HISTORY

BI-STATE COMPACT (MD & WV)

ENFORCEMENT OF NATURAL RESOURCE LAWS AND BOATING REGULATIONS

A few years after the completion of construction of the project in 1981, both Maryland and West Virginia natural resources police began to express concern over enforcement of natural resource laws and boating regulations on the reservoir due to the lack of a clearly marked state boundary on the lake surface. Issues regarding jurisdiction and venue were the primary concerns. The on-shore boundary of Corps of Engineers property is clearly marked in each state at 25 foot intervals and is not a problem for the resource agencies nor is the state boundary in most places. But the state boundary upstream of the dam is now obscured by the lake and the exact location of the boundary is not conveniently determinate for jurisdiction and venue purposes.

1991/1992 - The two states agreed that an enforcement compact with concurrent jurisdiction was the most appropriate method to overcome the jurisdiction/venue problem. This would allow either/both states to fairly and properly enforce the natural resource laws and boating regulations on the project. Early in 1992 the Interstate Commission on the Potomac River Basin (ICPRB) established a Fisheries Management Task Force comprised of representatives of the two states, the Corps, and ICPRB to meet, review, discuss, and develop a draft reciprocal agreement (Memorandum of Understanding, or MOU) for the Jennings Randolph Lake project based upon similar agreements between other states.

1993/1994 - The Memorandum of Understanding developed by the Task Force (the basis for the compact) was agreed to by the two states in 1993. The Maryland legislature passed the MOU in 1993 and the West Virginia legislature passed it in 1994.

1995 - Legislation proposing the compact was introduced into the Senate and passed in 1995 but legislation didn't make it to the floor in the House.

1996 - Legislation proposing the compact was re-introduced in the Senate, passed unanimously, and is currently awaiting action by the House.

CENAB-OPF-J

District Contact: N. Russell Newman (304)355-2346
Project Manager, Jennings Randolph Lake

Project Name: Jennings Randolph Lake Project Compact

Congressional Sponsors: Senator Sarbanes (MD), Senator Mikulski (MD), Senator Byrd (WV), Senator Rockefeller (WV), Congressman Mollohan (WV), Congressman Bartlett (MD).

Project Description: The Jennings Randolph project is located in Garrett County, Maryland, and Mineral County, West Virginia, on the North Branch Potomac River; 7.9 miles upstream from the mouth of the Savage River at Luke, MD.

Description of the Compact: The Jennings Randolph Lake Project Compact (Compact) is an agreement between the States of Maryland and West Virginia, with the concurrence of the U.S. Army Corps of Engineers (Corps), to provide for joint natural resource management and enforcement of laws and regulations relating to natural resources and boating at the Jennings Randolph Lake Project (Project).

Under the Compact, the signatory States and the Corps recognize their joint responsibility for the management of natural resources, and the enforcement of natural resources and boating laws and regulations. In recognition of that joint responsibility, the Compact provides for the concurrent jurisdiction of the signatories over the lands and waters at the Project, concerning natural resources and boating laws and regulations.

Basis for Congressional Approval: Under Article I, Section 10, Clause 3 of the U.S. Constitution, States are expressly forbidden from entering into any agreement or compact with other States without the consent of Congress. The Compact described above clearly falls within the scope of this provision and requires the approval of Congress to be effective and enforceable.

Background and Current Status: The 87th Congress, under Public Law 87-874, authorized the development of the Jennings Randolph Lake Project for the North Branch of the Potomac River for flood control, water supply, water quality, and recreation, substantially in accordance with House Document Number 469, 87th Congress, 2nd Session. Pursuant to this legislation, the Baltimore District Corps of Engineers did construct and now operates and maintains the project.

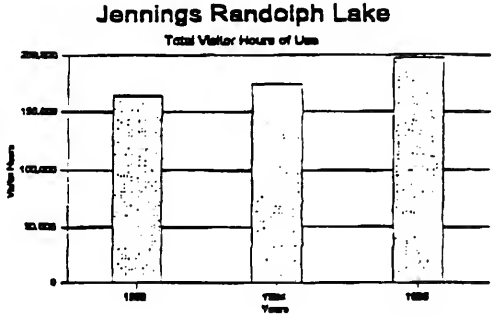
The creation of the lake obliterated the boundary line between Maryland and West Virginia thereby bringing into question the law enforcement jurisdiction of the two States. Re-establishing the precise location of the boundary on the lake has been difficult and never satisfactorily resolved due to the depth of the lake and the highly meandering nature of the former river boundary. Consequently, enforcement of natural resources and boating laws and regulations at the Project has been tentative at best, and at worst virtually nonexistent. The Compact will provide enforcement of these laws and regulations by establishing concurrent jurisdiction of the two States over the Project area. This approach eliminates the need to agree upon and mark a boundary on the lake before clear lines of law enforcement authority can be established. The on-shore boundary of Corps property (limit of concurrent jurisdiction) is very clearly marked every 25 feet.

The Compact was adopted by the Maryland legislature in 1993 and by the West virginia legislature in February, 1994. Legislation for the Compact was introduced to the U.S. Senate by Maryland Senator Paul Sarbanes and co-sponsored by Maryland Senator Barbara Mikulski, and West Virginia Senators Robert Byrd and Jay Rockefeller. A companion bill was introduced into the House by West Virginia Congressman Alan Mollohan and co-sponsored by Maryland Congressman Roscoe Bartlett. The bill passed the Senate earlier this year and is presently awaiting approval in the House.

Issues: On December 2, 1993 Governor William Donald Schaefer of Maryland, Governor Gaston C. Caperton of West Virginia, and Chairperson Phyllis M. Cole of the Interstate Commission on the Potomac River Basin entered into an agreement (Water Quality and Recreation Improvement Agreement - 1993) to form a task force for the improvement of water quality and recreational opportunities on the North Branch Potomac River. In full consideration of the existing project purposes of Jennings Randolph Lake and other constraints, the agreement directed the task force to work toward creating a substantial fishing and recreational industry in the North Branch watershed. One of the objectives of the agreement is to increase recreational use of the Project by a minimum of 100 percent above the current levels over the next ten years. As the recreational use of the lake continues to increase, it is anticipated that enforcement problems will become increasingly difficult. Without the States and the subsequent Congressional approval of the Compact, it is likely that enforcement of natural resources and boating laws and regulations at the Project would remain, for practical purposes, nonexistent.

ATTACHMENT #1

TOTAL PROJECT VISITATION, 1993-1995
JENNINGS RANDOLPH LAKE



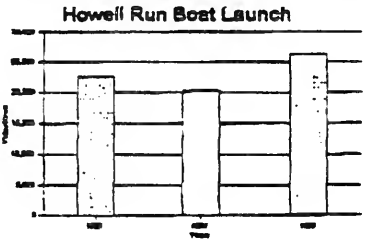
In 1993 a total of 163,700 visitor hours were recorded. The following year visitation rose 7 percent to 174,400 visitor hours, in 1995 it increased 13 percent to 197,300 visitor hours, and the overall visitation increased 21 percent from 1993. The graph and chart on this page show the relationship between the three years.

Year	Visitor Hrs.	Year to Year Comparison	% Change (Increase)
1993	163,700	-------	------
1994	174,400	1993 to 1994	7.00%
1995	197,300	1994 to 1995	13.00%

ATTACHMENT #2

TOTAL BOAT LAUNCH VISITATION, 1993-1995
HOWELL RUN BOAT LAUNCH

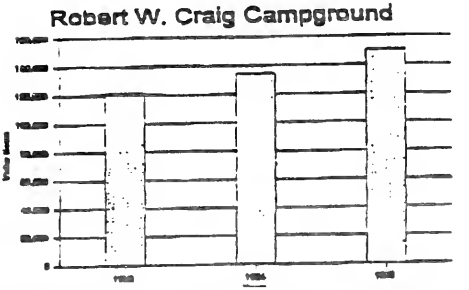
Visitation at Jennings Randolph Lake is spread among five recreation areas: Robert W. Craig Campground, Howell Run Boat Launch, Howell Run Picnic Area, and the Maryland and West Virginia Overlooks. Recreation areas with the highest visitation are the Howell Run Boat Launch and the Robert W. Craig Campground.



The Howell Run Boat Launch experienced an overall increase in visitation from 1993 to 1995 (16 percent). The slight visitation decrease in 1994, as shown in the graph and table, is attributed to an abnormally cool, but exceedingly dry summer (the boat launch was closed in July 1994 due to extremely low lake levels). However, 1995 rebounded with a 30 percent increase over 1994. The variance in visitor hours between 1993 and 1995 is due to lake fluctuations during the recreation season. The boat launch is closed by project staff when the lake level falls below 1,445 feet mean sea level (MSL) or rises above 1,470 feet MSL. Basically, the amount of precipitation received in the watershed each year directly affects the visitation numbers at the boat launch.

Year	Visitation	Year to Year Comparison	Percent Change
1993	22,600	------	------
1994	20,300	1993 to 1994	-10.00%
1995	26,300	1994 to 1995	30.00%

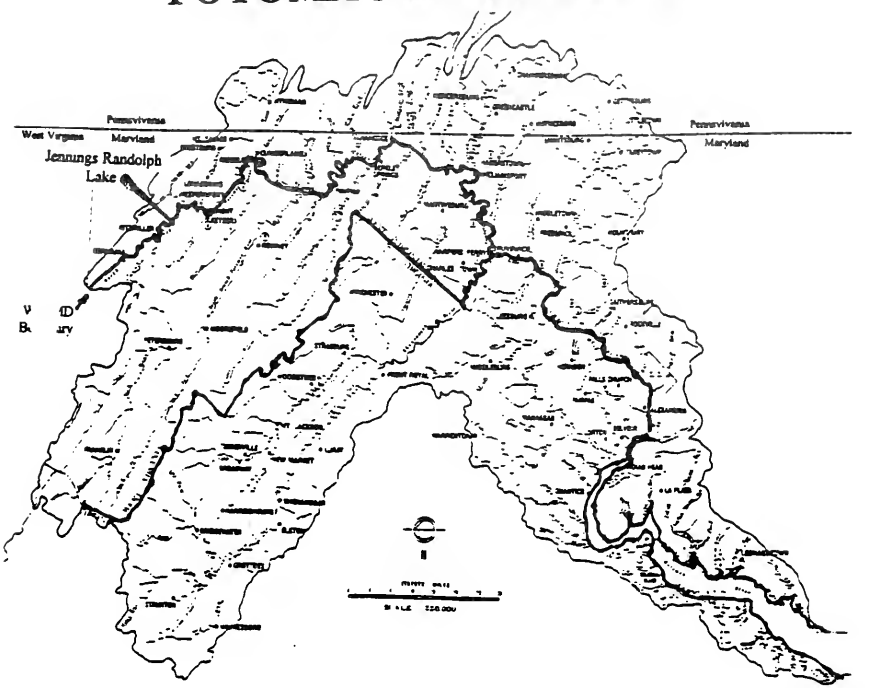
ATTACHMENT #3 TOTAL CAMPGROUND VISITATION, 1993-1995
JENNINGS RANDOLPH LAKE



The Robert W. Craig Campground has experienced a steady and significant increase in visitation from 1993 to 1995. The campground has a total of 87 sites; 23 sites were converted to electric in 1995 bringing the total sites with electricity to 48. Over the three year period represented in the graph and chart, visitation has increased 24 percent, at a average of over 14,000 visitor hours per year.

Year	Visitor Hours	Year to Year Comparison	% Change
1993	120,900	———	———
1994	134,000	1993 to 1994	11.00%
1995	150,100	1994 to 1995	12.00%

POTOMAC RIVER BASIN



Cumberland, Maryland, Friday, July 1, 1994

Jennings Randolph Lake pact in the works

KITZMILLER — Legislation allowing for a joint agreement between Maryland and West Virginia that would allow for better management of Jennings Randolph Lake was introduced this week by U.S. Senator Paul Sarbanes.

The measure is co-sponsored by U.S. Senator Barbara Mikulski and West Virginia Senators Robert Byrd and Jay Rockefeller.

Located on the north branch of the Potomac River in Garrett County, Maryland and Mineral County, West Virginia, the lake is growing in popularity as a recreational site and better managements of its resources is needed.

To enhance the water quality of the Potomac, improve water supply and increase recreational opportunities, the lake was created in 1982 with a dam across the river.

Unfortunately, the creation of the lake removed the natural boundary between the two states. The meandering nature of the former river and the depth of the lake have made it impossible to re-establish the precise location of the boundary.

The Sarbanes legislation will provide the two states with concurrent jurisdiction over the project area to enable them to jointly enforce natural resource boating laws and regulations.

The agreement would also cover recreation in the lake area.

Congressional approval of the agreement is required by the Constitution.

(Cumberland Times-News)

Cumberland, Maryland, Friday, September 22, 1995

Senate OKs legislation for Jennings Randolph Lake pact

For the Cumberland Times-News

WASHINGTON — The U.S. Senate ... unanimous approval Thursday to ...ation allowing Maryland and West ...ia to enter into a joint agreement for Jennings Randolph Lake, said U.S. Sen. Paul Sarbanes.

Sarbanes introduced the measure.

The lake is on the North Branch of the Potomac River in Garrett County, and Mineral County, W.Va.

The legislation will enable Maryland and West Virginia to jointly enforce natural resource boating laws and regulations by providing them with concurrent jurisdiction over the project area.

Better lake resource management is needed as it becomes an increasingly more popular recreational site for visitors and residents of both states, he said.

"Jennings Randolph Lake offers tremendous potential for Western Maryland. Environmentally, it is a significant part of the Potomac River basin and a critical component of our efforts to lower acid levels in the river and restore habitats for fish and other wildlife," said Sarbanes.

"Economically, it can be the focal point for growing opportunities in the areas of tourism and recreation. But we must balance environmental protection and economic progress. This compact will be a vital part of that effort."

Construction of an access road on the Maryland side of the lake and new boat ...ks are making the lake a more attractive destination for boating and fishing enthusiasts.

The waters below the lake are the site of a thriving trout fishery and the clear waters of the lake and the river are drawing visitors pulled to the area by its natural beauty.

Sarbanes has taken a number of steps in recent years to preserve the lake while making its beauty more accessible for the people of Maryland.

He has worked with the governments of both states and the Army Corps of Engineers to improve the access road on the Maryland side; he has addressed acid mine drainage on the North Branch of the Potomac; and he has added language to appropriations bills to have the Corps of Engineers develop a new management plan for the lake.

Jennings Randolph Lake was created with the construction of a dam across the river in 1982. This was done to enhance the water quality of the Potomac, reduce flood damage, improve the water supply and increase opportunities for recreation.

Cumberland Times-News
Saturday, September 23, 1995 8A

Editorial

Randolph lake

Agreement to help area reach potential

The Jennings Randolph Lake on the North Branch of the Potomac River has a better chance of reaching its potential as a top tourism and recreation spot now that the U.S. Senate has approved legislation making Maryland and West Virginia partners in regulating the area.

The man-made lake was created in 1982 for the primary purpose of improving Potomac River water quality and enhancing the area's water supply. The lake stretches into a portion of Garrett County in Maryland and Mineral County in West Virginia.

Although only a few years have passed since the huge dam was constructed, word about the lake's quality fishing and recreational appeal continues to spread. With the Maryland-West Virginia joint agreement now in place, the lake will be better managed and be able to reach its potential as a tourism and recreation area.

The legislation was sponsored by U.S. Senator Paul Sarbanes, D-Md., and enables the two states to jointly enforce natural resource boating laws and regulations by giving the jurisdictions concurrent regulating powers.

Cumberland Times-News

1C Wednesday, October 18, 1995

Congress urged to endorse bi-state lake compact

For the Cumberland Times-News

WASHINGTON — First District Congressman Alan B. Mollohan, D-W. Va., has introduced legislation that calls on Congress to endorse the Jennings Randolph Lake compact signed by West Virginia and Maryland.

"This compact, this agreement, is in the best interest of all who enjoy the lake and appreciate its tremendous potential for new recreational and economic development," said Mollohan, who has worked to promote new activity in the area.

"By allowing our states to share oversight of Jennings Randolph Lake, the compact will enhance the local resources and protect those who use them. It will also help provide a stable foundation for growth by eliminating any questions about jurisdiction," he added.

Creation of the lake obliterated the boundary line between Maryland and West Virginia, raising jurisdictional issues that have severely hampered law enforcement there.

The two states, together with the U.S. Army Corps of Engineers, forged the compact to resolve those issues. In the agreement, they acknowledge joint responsibility for managing the lake's resources and enforcing laws and regulations.

Mollohan's legislation would bring the compact into compliance with the U.S. Constitution, which states that Congress must approve any agreements between states.

Introducing the measure is the latest in a series of steps Mollohan has taken to help area residents make the most of the opportunities that Jennings Randolph Lake presents.

Through his position on the House Appropriations Committee, he secured $400,000 in 1993 to begin planning for economic and recreational development, and environmental remediation, of the lake.

He has placed $100,000 in a funding measure this year to complete a new master plan for public use of the lake, and has earmarked $275,000 for a feasibility study of environmental restoration on the North Branch of the Potomac River.

Mollohan said that Congressman Roscoe G. Bartlett, R-Md., joined him in sponsoring the measure that endorses the West Virginia-Maryland compact. Companion legislation sponsored by U.S. Sens. Robert C. Byrd and Jay Rockefeller, both D-W.Va., and their Maryland colleagues is pending in the Senate.

Mr. GEKAS. We turn to Colonel Turner.

STATEMENT OF LT. COL. THOMAS TURNER, DEPUTY SUPERINTENDENT, MARYLAND NATURAL RESOURCES POLICE

Colonel TURNER. Thank you, sir, I did not bring a prepared speech, I knew all of the statistical information would be given.

I am here to respond to any technical issues you may have, and I have a couple of comments.

Briefly, the river is too deep and too wide to be able to mark for your more traditional violations of criminal law. Time and sophisticated equipment could be brought in to determine the exact location of the crime, to put that in its adequate venue, but dealing with the day-to-day activities of natural resources and boating violations in which you could have as many as 50 to 60 vessels running back and forth across the river, it is inefficient and ineffective to have two law enforcement agencies enforcing two separate State regulations and then expect the public to be able to voluntarily comply.

By passing this we would have one uniform set of regulations and the two enforcement agencies could interact more efficiently and effectively by proper scheduling, and we support of passage of this.

Thank you sir.

Mr. GEKAS. The two agencies you are talking about——

Colonel TURNER. From West Virginia and Maryland.

Mr. GEKAS. Do the State police enter into this at all?

Colonel TURNER. No, sir. That was a reference that murder, rape, robbery-type, if, God forbid, that should occur, that would be time to stop the action and get the sophisticated equipment and determine the exact location, if necessary. But on these misdemeanor-type violations that are occurring daily, it would be more efficient and effective and easier to comply with the establishment of natural resources and boating regulations.

Mr. GEKAS. Now Major Daniel of West Virginia.

STATEMENT OF MAJ. WILLIAM B. DANIEL, ASSISTANT CHIEF CONSERVATION OFFICER, WEST VIRGINIA DIVISION OF NATURAL RESOURCES

Major DANIEL. Mr. Chairman, members of the subcommittee, I thank you for the opportunity to come before you and speak about H.J. Res. 113.

As I said, my name is William B. Daniel, and I am the assistant chief conservation officer of the Law Enforcement Section of LFDNR in West Virginia. This resolution will simply, like everyone else has said before me, authorize joint law enforcement activities on the project, mainly on the water. When you are on land you know where you are, but when you are on the water you don't know what State you are in.

This project was flooded in 1981, and became operational in 1982. We were very uncertain about our jurisdiction when we went out to do law enforcement activities on the water. The courts demand that you know where you are and establish venue and know where your jurisdiction lies. The passage of this resolution would

certainly assist us and make us, as law-enforcement officers, feel more comfortable when we are out there enforcing the laws.

I urge you all to take quick action on this issue, and I thank you for the opportunity to be here.

[The prepared statement of Major Daniel follows:]

PREPARED STATEMENT OF MAJ. WILLIAM B. DANIEL, ASSISTANT CHIEF CONSERVATION OFFICER, WEST VIRGINIA DIVISION OF NATURAL RESOURCES

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to present information regarding House Joint Resolution 113, Ratification of the Jennings Randolph Lake Compact. My name is William B. Daniel. I am the Assistant Chief Conservation Officer for the West Virginia Division of Natural Resources. The West Virginia Division of Natural Resources is the state agency responsible for the enforcement of the States natural resource laws and regulations.

House Joint Resolution 113 will authorize joint law enforcement activities on the Jennings Randolph Lake between the States of West Virginia and Maryland. The lake is on the border of the two states in Mineral County, West Virginia and Garrett County, Maryland. When this project was flooded in 1981, we could no longer determine the jurisdictional boundary required by courts for the successful execution of law enforcement activities related to angling and boating laws.

With the assistance of the Interstate Commission on the Potomac River Basin, both Maryland and West Virginia legislatures have passed identical bills providing for an interstate compact that would permit either state to take the appropriate law enforcement actions on Jennings Randolph Lake. Congress must ratify these compacts before the two states may proceed with the promulgation of rules relating to the angling and boating laws on this popular reservoir.

Mr. Chairman, the Senate has completed action on a companion resolution and we urge expeditious passage of House Joint Resolution 113. I would be pleased to take any questions you may have.

Mr. GEKAS. We thank you for your testimony.

Does any member of the subcommittee wish to offer any questions?

Mr. Reed, Mr. Nadler, Mr. Inglis.

One historical note; is this the area where General Stuart started his trek to Pennsylvania then got lost; do we know?

We don't know.

All right, thank you very much.

We will do as we told the other panels, our best to move this as fast as possible.

For the information of the members, we will begin the testimony on the next issue with our panel of witnesses until we have a quorum. As soon as a quorum appears for the markup, we will suspend the panel, and return to the markup. After which, we will return to the panel for their testimony.

We note the presence of the gentleman from Ohio, Mr. Chabot, and the gentleman from South Carolina, Mr. Inglis. We will wait the presence of one more member, then at that point, we may have to interrupt the testimony to proceed to markup on the previous issues, then return to you.

We have with us today for this portion, the oversight hearing on the reauthorization of Negotiated Rulemaking Act, Mr. Joseph A. Dear, Assistant Secretary of the Occupational Safety and Health Administration; Mr. Eric Waterman, National Erectors Association; and Mr. Philip Harter, who chairs the administrative law and regulatory practice segment pertaining to the American Bar Association.

This testimony, of course, is in keeping with what many have perceived a central focus of this Congress, and that is on the bu-

reaucracy, its rulemaking and its effect on the public, business and commerce, and on individual landowners, homeowners, the whole gamut of objects of rulemaking. To that effect, this subcommittee and the Congress have been involved in several regulatory reform bills.

The reform we are discussing today has good precedent because it became law back in 1990, when President Bush signed it into law, and has worked. We have noted in many situations that required commonsense agreements between those who are to be regulated and those who have to enforce the will of the Congress through the rules that they have promulgated. So this is a natural outcome of the continued interest that we note in this field.

We are in a position now where following this hearing we can try to negotiate a Senate-House compromise of this matter in due course.

So with that, we will begin with the testimony of Mr. Dear.

STATEMENT OF JOSEPH A. DEAR, ASSISTANT SECRETARY, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

Mr. DEAR. Thank you, Mr. Chairman, members of the committee. I appreciate this opportunity to discuss the Occupational Safety and Health Administration's efforts to improve its standard-setting process through the use of negotiated rulemaking.

Before I get into the specifics of our experience, I would just like for a moment to place this experience in the context of OSHA's larger reinvention.

President Clinton's 1995 "New OSHA" initiative talked about how OSHA should emphasize partnerships in how it goes about improving worker health and safety, to use common sense in developing and enforcing regulations, and to develop a new agency culture that focuses on reduction of injury and illness rates rather than on a processor of redtape.

In response to this concern, OSHA's cooperative partnership efforts use penalty reduction and other incentives for employers who make a good-faith effort to protect their workers while maintaining the agency's traditional enforcement program where that is the appropriate action to take.

OSHA's Maine 200 program, its focused inspection program in construction which targets only the most serious hazards in construction sites, a phone-fax method of responding to worker complaints about unsafe and unhealthy conditions, and the reduction of penalties or elimination of penalties for technical paperwork violations, all illustrate this new approach.

Now consistent with the Negotiated Rulemaking Act, OSHA has taken a number of steps to improve its dialog with and among stakeholders as we consider various regulatory actions. We now consult with stakeholders early, regularly and often before we finish setting standards.

One successful instance of this is the guidelines we recently issued to prevent violence in the workplace. Another example is a negotiation among employers and unions in the rubber industry to set a voluntary standard for butadiene exposures. A third example of stakeholder participation is an effort currently under way to reduce

the recordkeeping requirements for OSHA, to reduce the burden but also to improve the quality the data we received.

Mr. GEKAS. Which office in OSHA would initiate the contact to enter into the negotiations?

Mr. DEAR. I am ultimately responsible. We have two sections which develop health or safety standards, but the strategic objective of OSHA, is to reach out through informal stakeholder contacts or through the very formal structured approaches that the Negotiated Rulemaking Act calls for.

Let me, if I could——

Mr. GEKAS. I think we will ask you to suspend now. You can take up your testimony following our business session here.

This hearing is recessed, and now we reconvene the committee for the purposes of markup.

[Recess.]

Mr. GEKAS. We will pursue the testimony of Mr. Dear.

Mr. DEAR. Thank you, Mr. Chairman.

This committee is contemplating whether to reauthorize the Negotiated Rulemaking Act. Based on OSHA's experience with the negotiated rulemaking process, I strongly encourage you to do so.

As you know, Congress passed the NRA in 1990 because it felt that affected parties were discouraged from meeting and communicating with each other and that the existing rulemaking system encouraged a great deal of antagonism.

Many times the adversarial relationship resulted in time-consuming and expensive litigation. The NRA requires parties to meet face-to-face to develop a rule, which, if possible, reflects the needs and concerns of all constituencies. Not only are the ramifications associated with litigation reduced, but a tremendous amount of education occurs in this process.

Each potential candidate for rulemaking needs to be carefully reviewed. According to the criteria in the act, not all rules are appropriate for negotiated rulemaking. But where a potential hazard is a vitable candidate for negotiated rulemaking, it is something OSHA should do.

You will hear subsequently from other members of the panel about OSHA's experience with the development for a proposal to protect workers engaged in steel erection. Construction is one of the most hazardous industries in the country. The most frequent, serious, injuries to workers in the construction industry come from falls. Many of those workers are involved in the steel erection process.

In 1994, OSHA decided to use the negotiated rulemaking process to attempt to produce a consensus proposal for steel erection fall protection. The committee was successful and produced a consensus proposal, which we are now preparing for publication in the Federal Register.

If I could communicate anything to the committee about this Administrator's experience with negotiated rulemaking, it is this: The decision to engage in negotiated rulemaking involves placing trust in your stakeholders that they can come to the table, that they can focus on a problem, work constructively and cooperatively and develop a proposal which the agency can then take to the formal rulemaking process.

The trust I placed with labor, and management, and construction executives and experts who participated in this, was well justified. We not only achieved a consensus proposal, Mr. Chairman, we developed a proposal which was much more practical. It was better than what we could have produced on our own because it had the direct participation of the industry, management and labor, who are going to have to live with the rule as it was implemented in the field.

OSHA's experience tells me that this is something that other agencies should be encouraged to do. And most certainly, the Congress should reauthorize this act to provide this opportunity of using this very constructive tool to improve the protection of worker health and safety, the operation of government, and the efficiency of our whole way of working.

I thank the committee for this opportunity to appear before you this morning.

Mr. GEKAS. We thank the witness.

[The prepared statement of Mr. Dear follows:]

PREPARED STATEMENT OF JOSEPH A. DEAR, ASSISTANT SECRETARY, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

Mr. Chairman and Members of the Subcommittee, thank you for this opportunity to discuss the Occupational Safety and Health Administration's (OSHA) efforts to improve its standard-setting process by the use of negotiated rule making. Before I get into the specifics of OSHA's negotiated rule making experience, I would like to take a few minutes to detail the agency's recent efforts to "reinvent" itself as the "New OSHA."

NEW OSHA

President Clinton's 1995 "New OSHA" initiative emphasizes cooperative partnerships with employers and workers; common sense, plain language protective standards; and a new agency culture focusing on the reduction of injury and illness rates rather than the numbers of inspections, citations and penalties. Although the implementation of many of these new programs was slowed during the past year due to OSHA's funding situation, President Clinton's initiative has already improved OSHA's ability to protect America's working men and women, earned numerous awards, and won praise from both employers and workers.

Over the years, OSHA has been charged with being too confrontational with employers and refusing to differentiate between safe and unsafe employers. In response to this concern, OSHA has developed a "cooperative partnership" approach which uses penalty reductions and other incentives for employers who make a good faith effort to protect workers. At the same time, the agency has maintained its traditional enforcement program, to ensure that serious violators face serious consequences.

OSHA's Maine 200 program serves as an example of this new partnership approach. Under this program, OSHA identified the 200 employers in Maine with the highest number of injuries and offered them a chance to work in partnership with the agency. Participating employers eliminated hazards at these sites at a rate 14 times greater than would have been expected under the old OSHA. According to initial data received by OSHA's Augusta, Maine, Area Office, over half of these employers have achieved measurable reductions in workplace injuries and illnesses. The creativity and success of the Maine 200 program was acknowledged by the receipt of a 1995 Ford Foundation Innovations in American Government Award. Other states are now developing their own Maine 200-like programs.

Another incentive-based activity is OSHA's "focused inspection" program in the construction industry. In this program, if the employer has an effective safety and health program, OSHA will not conduct a full-scale inspection. Instead, OSHA inspects for only the most hazardous working conditions at a work site: fall hazards; electrical hazards; "struck by" hazards; and "caught in between" hazards. This has the added benefit of enabling OSHA inspectors to pursue other safety and health issues.

Consistent with the Negotiated Rulemaking Act's (NRA) goals, OSHA has recently taken numerous steps to improve its dialogue with (and among) the regulated community. Previously, OSHA had heard criticism that it had not listened closely enough to employers, workers and safety and health professionals in the standard-setting process, and that as a result, its regulations were too complicated and hard to understand. In response, the agency now consults with stakeholders both early and often in the development of protective standards to ensure that new rules make sense. One successful instance of stakeholder input involves OSHA's development of voluntary guidelines related to the growing problem of workplace violence. These voluntary guidelines, which went into effect last Spring, cover workers in the health care and social services industry, an industry which (according to BLS statistics) has a dramatically higher incidence of workplace violence than general private industry. With the close involvement of industry and workers, OSHA has also developed a draft set of similar voluntary guidelines to help curb violence in the night retail industry. Likewise, the agency's standard to protect workers from butadiene exposures will be based on an agreement between workers and employers in the synthetic rubber industry. A final example of OSHA's expanded efforts to increase stakeholder participation can be found in our attempt to simplify recordkeeping requirements and improve the quality of data collected. We accomplished this by holding meetings where a broad spectrum of business and organized labor shared their viewpoints on how worker safety and health could be improved through more efficient data collection.

OSHA is also responding to criticism that the agency was too concerned with paperwork violations. In response, the agency has taken steps to reduce or eliminate penalties for technical paperwork violations. For example, in 1990, OSHA issued 5,059 citations for failing to put up an OSHA poster, assessing an average fine of $400 for each violation. Through the first six months of fiscal year 1996, OSHA issued just four poster violations, all for willful or repeat violations. As a consequence of these and other changes, citations for the most common paperwork violations have declined by 71% over the past six years.

Finally, OSHA has eliminated performance measures based on inspections, fines and citations. We are now developing a new performance system tied to real improvements in safety and health. In addition, OSHA is redesigning each of its field offices to expand the use of proactive, cooperative approaches as an enforcement tool, and to improve efficiency and customer service. For example, in order to speed up the informal complaint process, OSHA now uses telephone and facsimile methods to investigate informal complaints instead of drafting a letter, mailing it, and awaiting a response. This new process has improved worker protections by substantially reducing the time from complaint to abatement of hazards: from 32.5 days to just 8.5 days in Atlanta; from 35 days to just 11 in Columbus; and from 39 days to just 9 in Wichita.

NEGOTIATED RULEMAKING

This Subcommittee is contemplating whether to reauthorize the Negotiated Rulemaking Act. Based upon OSHA's experience with the negotiated rulemaking process, I strongly urge that you do so.

Congress passed the NRA in 1990 because it felt that the affected parties were discouraged from meeting and communicating with each other and that the existing rulemaking system encouraged antagonistic positions. Many times, this adversarial relationship resulted in time-consuming, expensive litigation. The NRA requires parties to meet face-to-face to develop a rule which, if possible, reflects the needs and concerns of all constituencies. Not only are the ramifications associated with litigation reduced by the negotiated rulemaking process, but a tremendous amount of education occurs for all parties. At the same time, Congress recognized that negotiated rulemaking was not a panacea. Each potential candidate must be reviewed to determine if it is suitable for negotiated rulemaking. The NRA sets out seven specific factors which must be considered in the determination process. They are useful for predicting whether to plan an effort that will require the expenditure of considerable time and effort.

Even before the passage of the NRA, OSHA successfully experimented with formal negotiated rulemaking. In 1985 the agency, following a declaration by EPA, determined that exposure to Methylenedianiline (MDA) presented a significant risk to humans and concluded that the risk could be reduced through feasible abatement requirements. MDA is a chemical used in producing polyurethane foams and elastomers. It is used extensively in the aerospace and electronics industries.

Instead of following the normal rulemaking procedures, OSHA established a Negotiated Rulemaking Advisory Committee under Section 7(b) of the Occupational

Safety and Health Act (OSH Act) to develop consensus recommendations for an MDA standard. The membership of the committee consisted of a broad spectrum of affected parties. Industry was represented by, among others, the National Electrical Manufacturers Association, the Chemical Manufacturers Association and the Suppliers of Advanced Composite Materials Association. The International Association of Machinists and Aerospace Workers, the United Steel Workers of America and the United Brotherhood of Carpenters and Joiners of America represented organized labor. The National Institute for Occupational Safety and Health (NIOSH) and the Department of Energy are examples of governmental representatives on the committee.

The committee met seven times, achieved consensus, and presented recommendations to OSHA for MDA standards for general industry and construction. The Committee consensus was published in the Federal Register in July, 1987, less than three months after consensus was reached. When the proposed rulemaking was published, minimal public comments were received and the public hearing was extremely short compared to traditional OSHA health standard hearings. The final MDA standard was never challenged in court. I attribute these remarkable facts to the active participation of all affected parties in the development of the rule. The participants also realized that they had been given the rare opportunity to fashion a regulation to meet their particular needs. They took their charge seriously and worked long and hard to complete a rule which benefited workers and made sense.

STEEL ERECTION

A more recent example of OSHA experience in negotiated rulemaking involves the development of protections for workers engaged in steel erection, through the Steel Erection Negotiated Rulemaking Advisory Committee (SENRAC). Although it employs only 5% of the work force, construction accounts for some 20% of the occupational fatalities occurring annually. Approximately one-third result from falls from high places. Among construction workers, those erecting steel structures are most at risk.

SENRAC's perseverance led to a major success. SENRAC's membership consisted of, among others, the Iron Workers International; the Associated General Contractors of America; the Associated Builders and Contractors; the National Erectors Association; the United Steel Workers of America; and NIOSH. In addition, all parties having a substantial interest in this rulemaking had the opportunity to participate at Committee meetings and work group meetings.

SENRAC began its negotiations in June 1994, and reached consensus on the text of a proposed rule in December 1995. The process included eleven meetings to hammer out longstanding differences that, until negotiated rulemaking, could not be resolved. Following the successful negotiations, one SENRAC member is quoted as saying "[T]he core of the industry, organized labor and organized contractors, were in total lock-step the whole way." Stakeholders like Black & Veatch, an engineering and construction firm, called it a "dynamic process that produced a standard that will be very use able, easy to understand, and will save lives . . . the result was a product that the government didn't develop and shove down industry's throat." The International Association of Bridge, Structural & Ornamental Iron Workers (AFL–CIO), stated "This is a major success that permitted those who must abide by a government regulation to help write it. Because it was done this way, it will expedite swift voluntary compliance by the industry."

I would also like to take a moment to point out that, early on, SENRAC determined that the special needs and concerns of the small business community would not get swept aside in the negotiations. The flexibility of negotiated rulemaking allowed the Committee to consider the needs of all elements of the industry. The Committee crafted several provisions with special consideration given to small erectors. As an example, a separate section was developed for small builders who erect pre-engineered metal structures exclusively, so as to promote compliance. These are only a few examples of how the group took into consideration the requirements of all elements of the industry.

OSHA staff are presently preparing a Notice of Proposed Rulemaking (NPRM) based on the SENRAC consensus text. We hope to publish the NPRM by the end of this calendar year.

FIRE PROTECTION IN SHIPYARDS

As another indication of the agency's commitment to the process, OSHA, just this month, published a "Notice of Intent to Form Negotiated Rulemaking Advisory Committee to Develop a Proposed Rule on Fire Protection in Shipyard Employment" in the *Federal Register*. This committee will be established under the aegis of the Fed-

eral Advisory Committee Act (FACA) and the NRA. As we stated in the preamble to this notice, "[t]he most important reason for using Neg/Reg is that the shipyard stakeholders from all sectors strongly support con sensual rulemaking efforts like negotiated regulation. OSHA believes this process will be less adversarial than regular rulemaking and will result in a proposal that will effectively protect employees."

The committee will include about 15 members representing such significantly affected interests as shipyard owners; contractors; labor organizations representing employees who perform fire protection work; firefighters, including both in-yard/plant and municipal; government entities, particularly the Navy and the Coast Guard; professional associations; and manufacturers and suppliers of fire protection equipment. The agency will also seek public comment on whether additional interests should be included.

The agency hopes to have a draft NPRM ready by the summer of 1997.

CONCLUSION

OSHA is pursuing the use of negotiated rulemaking because this Administration, the Department of Labor, and OSHA are committed to cutting the red tape and bureaucratic process which can lead to confrontation rather than consensus. Past experience has taught us that negotiated rulemaking is advantageous only when all major interests in a particular rulemaking are represented, and when the issues addressed are finite and manageable within the available time. If not, there is almost a guarantee that the final rule will end up in litigation. The legal process can take many months to run its course. Already tight resources, which could be used for other purposes, are spent on litigation costs. Workers continue to be injured during the interim. By working together, as partners in the process, there is a much higher compliance rate than through traditional rulemaking methods. This is because industry is aware of each step of the process and can keep its membership informed, so they know what needs to be done to meet the requirements.

Another benefit from having the parties together in one room, hashing out a compromise, is that they can come to appreciate each other's position and respect the sincerity of each party's beliefs. What tends to happen during successful negotiated rulemaking process is that the confrontational/adversarial wall is broken down. The group then begins to create from a common purpose. I believe that the lessons that each party takes away from a successful process are priceless. Not only do they create bridges over seemingly impassable chasms but they help both the regulated party and the regulator to appreciate different views.

Not all rules are suitable for negotiated rulemaking. However, if a determination is made that public interest is better served by using the method, then an agency head should not be reluctant to use the process. I believe one member of the SENRAC put the whole process in perspective when he said: "Everybody was on the same side"—the side of worker safety. NRA is good public policy because it makes common sense. I ask that you act expeditiously to reauthorize the legislation.

Mr. GEKAS. We turn to Mr. Waterman.

STATEMENT OF ERIC S. WATERMAN, DIRECTOR, MEMBERSHIP SERVICES, NATIONAL ERECTORS ASSOCIATION

Mr. WATERMAN. Thank you, Mr. Chairman.

My name is Eric Waterman. I am director of membership services for the National Erectors Association. On behalf of the members of the NEA, I am pleased to have the opportunity to appear before you this morning to strongly endorse negotiated rulemaking.

The NEA is a national trade association of union construction contractors founded in 1969 in Washington, DC. Our member companies range from the smallest local subcontractor to some of the largest national and international construction firms in the world.

The NEA's primary mission since its beginning has been to promote innovative labor-management cooperative efforts in the construction industry. One example of these efforts is the national maintenance agreements program, which was founded by the NEA and international unions of the International Building and Construction Trades Department of the AFL–CIO in 1971. Today this program includes almost 4,000 union contractors who employ

skilled building trade craft workers to perform industrial maintenance and repair work in the country's basic industries.

This program has logged over 1 billion hours of work and has literally rebuilt and retooled our Nation's auto industry, steel industry, chemical industry and many, many others. So as you can see, the NEA and the Building and Construction Trades Department and their international unions know a little bit about the benefits of labor and management working together.

Eleven years ago OSHA proposed major changes to the construction industry fall protection standards, that both the NEA and one particular international union felt were extremely impractical and unrealistic. I had been working with NEA for a little over a year at that time.

Beginning in 1986, the NEA and the Iron Workers International Union have led a labor and management coalition to respond to these proposed regulations. Along the way we discovered a process called negotiated rulemaking. The NEA and the Iron Workers International Union began discussions with OSHA in a sincere attempt to educate OSHA's standard writers about the construction industry.

We attempted to demonstrate how a proposed fall protection rule that would require that no construction worker ever be exposed to a fall of 6 feet or more was an impractical approach to impose on our Nation's largest industry. We tried to show the agency that a one-size-fits-all approach ignored some of the basic realities of the construction industry.

The Iron Workers and the NEA provided data to show OSHA that the agency's cost-benefit analyses were deeply flawed. We brought in actual construction workers who testified that the proposed regulations were, in some cases, actually dangerous and unsafe.

NEA and Iron Worker representatives testified together at public hearings to make the industry's case. Our best efforts were basically ignored by OSHA at that time; the agency thought it knew best.

For 10 years, the Iron Workers and the NEA fought the 6-foot fall protection rule. We persisted in a determined effort to force the Department of Labor to listen to labor and management. Our industry spent hundreds of thousands of dollars in legal fees, job site visits, economic analyses reports, meetings and litigation.

What made this effort so unique and so wasteful was the fact that labor and management industry representatives were united against a Federal agency that was charged with regulating that very same industry. Something was truly wrong with this picture.

In 1988, the Iron Workers, the NEA, and our Joint Labor-Management Safety Advisory Committee first requested negotiated rulemaking under 7(b) of the OSHA Act. We were denied. We were told by OSHA that negotiated rulemaking was only appropriate when labor and management disagreed.

We were told that negotiated rulemaking was too expensive and would unnecessarily delay the promulgation of new standards. We were told a lot of things that just did not make good common sense to a bunch of ironworkers and contractors.

The NEA and Iron Workers refused to take no for an answer. We continued in a seemingly hopeless quest to convince the Department of Labor to agree to negotiated rulemaking. The passage of the Negotiated Rulemaking Act of 1990 gave some encouragement that the Federal Government might begin to listen.

Finally, in 1991, a new OSHA Secretary Jerry Scannell agreed to listen to the NEA and the Iron Workers. Mr. Scannell was so impressed by this unified labor-management effort that he agreed to personally visit several construction projects in Chicago. I might mention that was in January in Chicago to boot. NEA and the Iron Workers International Union leaders accompanied Mr. Scannell on these visits, including Executive Vice President Noel Borck of NEA and the general president of the Iron Workers, Jake West.

As a result of these visits, Mr. Scannell appointed Mr. Tim Cleary, former chairman of the OSHA Review Commission, to investigate the industry's case further. Mr. Cleary toured several more job sites with the NEA and Iron Workers representatives in 1991. His report concluded that labor and management were right and that negotiated rulemaking should be implemented immediately to resolve this issue.

In 1992, 5 years after the NEA the Iron Workers and the Safety Advisory Committee has first requested negotiated rulemaking, Secretary of Labor Lynn Martin approved the industry's request. It took another 2 years before OSHA appointed the Steel Erection Negotiated Rulemaking Advisory Committee, or as we call it, SENRAC. This was done under the leadership of OSHA's Assistant Secretary Joe Dear.

Mr. Dear named Mr. Phil Harter as the facilitator for SENRAC. I had the honor of being appointed to the SENRAC committee.

SENRAC held its first meeting in June 1994, only 18 months—that is months, not years—18 months later, on December 1, 1995. The 20-person SENRAC committee unanimously agreed to a proposed comprehensive new standard, ending our industry's 10-year struggle.

We have provided a brief summary to the subcommittee of some of the many and innovative and practical methods that the SENRAC committee developed to address the real hazards that face those workers who make their living in construction. We would like to publicly thank OSHA Assistant Secretary Dear and Phil Harter for the leadership that they demonstrated in helping to bring this negotiated rulemaking to a successful conclusion.

Some of the other individuals at the Department of Labor who should also be recognized for their hard work and dedication during our negotiated rulemaking include Jim Estep, Mark Hagermann, and Bart Chadwick.

There is much talk these days about reinventing government. OSHA's Assistant Secretary Dear and his staff have done much more than simply talk about reinventing government; they have implemented many new and innovative and effective reforms to OSHA. But, in our opinion, none of these reforms has any greater potential to really reinvent government than does negotiated rulemaking.

Negotiated rulemaking simply makes good common sense. There is no better way to develop or revise Federal regulations than to

bring the stakeholders of an industry together with the Government and institute negotiated rulemaking.

We think the lessons learned SENRAC in our 10-year struggle to bring labor and management input into the regulatory process have implications and benefits far beyond just OSHA and the construction industry. The length of time it takes for many Federal agencies to develop new regulations or revise existing standards drags on for years and sometimes decades. The regulatory process itself and the outcome it produces have often become nightmares. While the NEA is not a staunch proponent of new regulations, we do realize the benefit of some Federal regulations, especially those that make good common sense.

[The prepared statement of Mr. Waterman follows:]

PREPARED STATEMENT OF ERIC S. WATERMAN, DIRECTOR, MEMBERSHIP SERVICES, NATIONAL ERECTOR ASSOCIATION

Mr. Chairman and Members of the Subcommittee:

On behalf of the member companies of the National Erectors Association, I am pleased to have the opportunity to appear before you this morning to strongly endorse Negotiated Rulemaking.

The National Erectors Association or NEA, is a national trade association of union construction contractors that was founded in 1969 in Washington, D.C. Our member companies range from small local subcontractors to some of the largest national and international construction firms in the world. The NEA's primary mission since its beginning has been to promote positive labor-management cooperative efforts in the construction industry.

One example of these efforts is the National Maintenance Agreements Program which was founded by the NEA and International Unions of the Building and Construction Trades Department of the AFL-CIO in 1971. Today, this program includes almost 4,000 union contractors who employ skilled building trades craft workers to perform industrial maintenance and repair work in our country's basic industries. This program has logged over 1 billion hours of work and has literally rebuilt and retooled our nation's auto industry, steel industry, chemical industry, oil industry, electrical power industry and many, many others.

So, the NEA and the skilled craft workers of the Building and Construction Trades Department and their International Unions know a little bit about the benefits of labor and management working together. That is why in 1986, when OSHA first proposed major changes to the construction industry fall protection standards that both the NEA and the Iron Workers International Union felt were impractical and unrealistic, the NEA and the Iron Workers began a labor-management coalition to respond to these proposed regulations. Along the way, we discovered a process called Negotiated Rulemaking.

In 1986, the NEA and the Iron Workers International Union began discussions with OSHA in a sincere attempt to educate OSHA standard writers on the construction industry. We attempted to demonstrate how a "One Size Fits All" proposed fall protection rule that would require that no construction worker ever be exposed to a fall of six feet or

more, was an impractical approach to impose across the board on our nation's largest industry.

The Iron Workers and the NEA provided data to show OSHA that the agency's cost/benefit analyses were also deeply flawed and ignored some of the basic realities of the construction industry. We brought in actual construction workers who testified that the proposed regulations were in some cases actually unsafe. NEA and Iron Worker representatives testified together at public hearings to make the industry's case.

Our best efforts were basically ignored by OSHA. The agency thought it knew best. For 10 years, the Iron Workers and the NEA fought the "Six Foot Fall Protection Rule." We persisted in a determined effort to force the Department of Labor to listen to labor and management. Our industry spent hundreds of thousands of dollars in legal fees, jobsite visits, economic analyses reports, meetings, and litigation. What made this effort so unique and so wasteful, was the fact that labor and management industry representatives were united against a federal agency that was charged with regulating that very same industry. Something was truly wrong with this picture.

In 1988, the Iron Workers, the NEA and our joint labor-management Safety Advisory Committee which is comprised of additional industry organizations, first requested Negotiated Rulemaking under 7(b) of the OSHA Act. We were denied. We were told Negotiated Rulemaking was only appropriate when labor and management disagreed. We were told that Negotiated Rulemaking was too expensive. We were told that Negotiated Rulemaking would unnecessarily delay the promulgation of new standards.

We were told a lot of things that just did not make common sense to an Iron Worker or a contractor. The NEA and the Iron Workers refused to take no for an answer. We continued in a seemingly hopeless quest to convince the federal bureaucracy to press for Negotiated Rulemaking after the passage of the Negotiated Rulemaking Act in 1990.

Finally in 1991, a new OSHA Secretary, Jerry Scannell, agreed to listen to the NEA and the Iron Workers. Mr. Scannell was so impressed by this unified labor-management effort, that he agreed to personally visit several construction projects in Chicago with NEA and Iron Worker International Union leaders including the Executive Vice President of the NEA Noel Borck and the General President of the Iron Workers Jake West.

As a result of these visits, Mr. Scannell appointed Mr. Tim Cleary, former chairman of the OSHA Review Commission to investigate the industry's case further. Mr. Cleary toured several more jobsites with NEA and Iron Worker representatives in 1991. His report concluded that Negotiated Rulemaking should be implemented immediately to resolve this issue.

In 1992, five years after the NEA, the Iron Workers and the Safety Advisory Committee had first requested Negotiated Rulemaking, Secretary of Labor Lynn Martin approved the industry's request. It took another two years before OSHA appointed the Steel Erection Negotiated Rulemaking Advisory Committee or SENRAC which held its first meeting in June 1994. This was done under the leadership of OSHA Assistant Secretary Joe Dear. Mr. Dear named Mr. Phil Harter as the facilitator for SENRAC.

Only 18 months later on December 1, 1995, the 20 person SENRAC committee unanimously agreed to a proposed comprehensive new standard ending our industry's 10 year struggle. We have provided a brief summary to the subcommittee of some of the many innovative and practical methods that the SENRAC committee developed to address the real hazards that face those workers who make their living in construction.

We would like to publicly thank OSHA Assistant Secretary Dear and Phil Harter for the leadership that they demonstrated in helping to bring this Negotiated Rulemaking to a successful conclusion. Other individuals at the Department of Labor who should also be recognized for their hard work and innovation during our Negotiated Rulemaking include, Jim Estep, Mark Hagemann and Bart Chadwick.

There is much talk these days about reinventing government. OSHA Assistant Secretary Dear and his staff have done much more than simply talk about reinventing government, they have implemented many new innovative and effective reforms to OSHA. But in our opinion, none of these reforms has any greater potential to really reinvent government than does Negotiated Rulemaking. Negotiated Rulemaking makes good common sense. There is simply no better way to develop or to revise federal regulations than to bring the stakeholders of an industry together with government and institute the Negotiated Rulemaking process.

We think the lessons learned from SENRAC and our 10 year struggle to bring labor and management input into the regulatory process have implications and benefits far beyond just OSHA and the construction industry.

The length of time it takes for many federal agencies to develop new regulations or revise existing standards drags on for years and sometimes decades. The regulatory process itself and the outcomes it produces have often become nightmares. While, the NEA is not a staunch proponent of more government regulations, we do recognize the benefit of some federal regulations, especially those that make good common sense. Our members and their skilled craft workers make their livelihood in the industry and we happen to think we know what makes sense more than a federal standard writer who may never have worn a hardhat or been on a construction project.

The recent best seller ***The Death of Common Sense*** by Philip Howard gave an excellent view of the bureaucratic maze and mindset that often rules Washington, D.C. The lengthy regulatory process and its bureaucratic practitioners often produce regulations we don't need or regulations so infinitely complex, technical and numerous, that it is impossible for even the most conscientious employer to ever be in compliance with every single regulation that governs their industry.

According to Mr. Howard, OSHA alone has over 4,000 regulatory requirements. No OSHA bureaucrat, no matter how brilliant, can sit in a cubicle in the halls of the Department of Labor, and draft a standard to govern an entire industry without the meaningful input of the workers and the employers of that industry. Negotiated Rulemaking gives the federal government a formal but flexible process to receive this valuable input.

Without this process, the momentum for new federal regulations is often driven by consultants, product manufacturers, and interest groups who have one agenda or another to promote a regulation for their own benefit. Federal standard writers are often attempting to draft standards for an industry while only receiving input from many special interest parties rather than the actual stakeholders of that industry. When I say stakeholders, I mean the workers and the employers of the industry that will be affected by these regulations. Negotiated Rulemaking will help every federal agency to see the "forest for the trees" and get real input from these stakeholders before the regulatory train has left the station and begun an adversarial process that can literally drag on for years.

Our Negotiated Rulemaking Committee drafted our own set of rules for our industry. We studied the real causes of accidents and injuries in our industry and drafted practical and effective methods to prevent them. Through Negotiated Rulemaking the SENRAC committee also initiated debate on many other areas of vital importance for construction safety and health that transcended the details of this particular standard.

One of these issues that the SENRAC committee raised for public debate was who should be held responsible for safety on multi-employer construction projects. Too often, responsibility for safety on a project is left open to be a subject for litigation. Liability for safety is shoved down the line to the lowest tier subcontractor who is least able to control conditions on a multi-employer jobsite. Once a model for American "Can Do" spirit, the construction industry like many others, has become a litigious minefield.

Owners, general contractors and subcontractors have become consumed with the need to avoid any appearance of responsibility or liability for safety on the jobsite. Our industry has been driven by a "bottom line" mentality that has sacrificed contractors, safety, quality and

responsibility on the false altar of a risk free, liability free, hold harmless mirage that is destroying the wealth and the high skilled, high paid jobs of our country's largest industry. The SENRAC committee has helped to begin an honest debate on this subject.

The SENRAC committee also performed a comprehensive in-depth analysis of the actual causes of deaths and injuries in the construction industry that was a first of its kind for our industry. After 18 months of our deliberations, we discovered that there really is a better way for government to work and that way is Negotiated Rulemaking.

The NEA believes that the use of Negotiated Rulemaking could be greatly expanded. When the federal government needs to develop a new standard or revise an existing one, strong consideration should be given to establishing a Negotiated Rulemaking Committee for a period of 12 months. The cost of employing a facilitator pales against the costs of whole departments of standard writers who are employed throughout so many government agencies. And even if the Negotiated Rulemaking committee does not come to consensus within a year, they will have brought to focus and identified the key areas for federal standard writers to resolve later in the process. To say that Negotiated Rulemaking is too expensive or too slow, is simply not supported by the facts!

NEA President Keiran O'Brien, NEA Executive Vice President Noel Borck and Iron Worker General President Jake West asked me to convey their strongest endorsement for Negotiated Rulemaking. The NEA and the Iron Workers hope that the success of our Steel Erection Negotiated Rulemaking Advisory Committee will serve as a clear and strong example for a whole new way for government to work. Negotiated Rulemaking will result in better government and more effective regulations through the active participation of all the parties involved.

The NEA is grateful and proud of the support and cooperation that our partners in the Iron Workers International Union have shared with us over these many years in this effort. The courage, the leadership, the commitment, and the countless long hours of work and meetings around the country that General President West and members of his staff have shown have been critical to this effort. The NEA and the Iron Workers have shown the benefits not only of Negotiated Rulemaking but also of labor-management cooperation. We sincerely hope that we can be of some example for other industries.

On behalf of the members of the National Erectors Association, I strongly urge that you act expeditiously to reauthorize the legislation to help reinvent the federal government through the use of Negotiated Rulemaking.

Mr. GEKAS. The time of the gentleman has expired.

Your written statement will be submitted without objection for the record, and we won't penalize Mr. Harter for the time.

One question: From the time that Mr. Dear and Mr. Harter entered the picture which you portrayed here, you say only a really short period of time elapsed before final resolution; is that correct?

Mr. WATERMAN. Right, 18 months.

Mr. GEKAS. That was following the enactment of bill, the law in 1991, I guess it was, and the promulgation of the necessary forum by Lynn Martin is that correct?

Mr. WATERMAN. Secretary Martin approved the process, but it still took until Mr. Dear came into office approximately 2 years to start the committee.

Mr. GEKAS. If we started something today, we could gauge the time that it would take to resolve something, as the time in this particular case, that began with the entry of these two gentlemen. Would that be a fair estimate of the time involved; would it not?

Mr. HARTER. Typically, it takes a year from the start of somebody actually deciding to use negotiated rulemaking to reach an agreement.

Mr. GEKAS. I am laying the groundwork for a question I want to ask later, but now to Mr. Harter.

STATEMENT OF PHILIP J. HARTER, CHAIR, SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE, AMERICAN BAR ASSOCIATION

Mr. HARTER. I am Philip Harter, and I appear with three hats, and maybe three heads this morning. The first and most prominent one; I am the chair, Section of Administrative Law and Regulatory Practice, American Bar Association. The second is that I am the cochair, ABA's Task Force on Regulatory Reform, which is applicable to an awful lot of effort this committee has been doing in the last Congress. And third, I was the mediator for SENRAC, so I come with a practical bent on it.

I am here today to once again offer the strong unequivocal support of the American Bar Association for the reauthorization of the Negotiated Rulemaking Act. The ABA formally adopted a resolution at its 1995 midyear meeting urging Congress to reauthorize the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act on a permanent basis. And, indeed, just to emphasize that endorsement, the ABA has determined that securing the reauthorization of those two acts on a permanent basis is a very important legislative priority, indicating the magnitude of their support.

Let me give just a brief overview of the process. The way negotiated rulemaking works is that someone, called a convener, makes a concerted effort to make sure that the interests that would be affected by the rule are identified and suitable representatives of those interests selected to participate. So it is the Government making an outreach to make sure that the views of the full range of people who are affected are incorporated into the rule, as opposed to simply allowing those people to react to something that is published in the Federal Register.

It also requires that that group reach a consensus, a uniform agreement. Everybody has a veto over it. So it is really in truth a direct participation and not public participation which, at least in most administrative law, means you get to comment but not participate. Negotiated rulemaking in fact means, the ability to influence the outcome of the rule itself.

I suppose everyone's first reaction is that if you are asking for a consensus, you can never get it; and secondly, it means that if you get it, do you want it, because it is probably going to be so watered down? If you look at the experience, it not only works but works very well. The committee identified far more issues than were on the table initially. This started as a one-issue rule, and it ended up really addressing the full range of concerns in steel erection.

Reformulated gasoline is another one—an enormously complicated rule that was developed by consensus. If you look at the history of negotiated rules, it has an interesting paradox in that the rules that emerge from negotiation are almost uniformly more stringent than the agency would have been able to issue on its own, precisely because the people participate and they can identify what is important and where to focus the resources.

The rule is more stringent when viewed as a whole, not each individual component and yet, here is the paradox, it is usually cheaper to implement precisely because you have practical people sitting around a table that know what is needed and they can say, here is the best way to address those kinds of issues.

As Eric mentioned, sometimes people will say, well, that is fine, negotiated rules are only good for noncontroversial issues or where you only have one or two parties. SENRAC shows reg neg can take on the big, controversial issues. The law allows that in spades. First of all, as for controversy, the thing that had been kicking around OSHA for 20 years, why hadn't OSHA issued a rule? Precisely because it was so controversial. Anytime they tried to zig, the other people push a zag and deadlock resulted.

As for diversity, if you look at SENRAC membership, here is labor and management coming in together, it looks like it is all nice and comfortable, doesn't it? Eric didn't point out there were two unions that were engaged in a jurisdictional fight before the AFL–CIO. Hell hath no fury greater than that. There were unionized contractors and nonunionized contractors, and rarely are they comfortable together.

It had academics; it had people who just didn't have to worry about cost. It had full-range and small contractors, so it was a wild and contentious bunch. It took us a while to settle down, frankly. But demonstrates that you can do that.

Again, just to summarize, the process works, it works well, and we endorse its enactment. There are a few issues that we would like to see addressed that would remove some inadvertent inhibitions that have caused agencies to not use the process nearly as much as they otherwise might. In the first instance, a negotiated rulemaking committee is and should be subject the Federal Advisory Committee Act. FACA requires agencies to secure a charter before it can undertake its business.

Currently that is taking 4 or 5 months to get done; it greatly delays the process, and it is totally unneeded. A notice of the intent to engage in negotiated rulemaking provides all that public notice that the FACA charter does. The Senate added a provision in its version of the ADR bill and the negotiated rulemaking to suggest that OMB study this process. I urge you change that so that OMB ought to take appropriate action to expedite the establishment of committees. There are lots of things to be done administratively.

Second, this is just to clarify that the Reg Neg Act is an independent source of authority to engage in this. Several agencies have either ceilings on how much the agencies can spend on advisory committees, or like OSHA has its § 7(b), which specifies exact composition and everything, which is fine if you are voting, but this is really a different process. It would greatly help if those were addressed.

I appreciate the opportunity to be here and express our wholesale support.

[The prepared statement of Mr. Harter follows:]

PREPARED STATEMENT OF PHILIP J. HARTER, CHAIR, SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE, AMERICAN BAR ASSOCIATION

My name is Philip J. Harter. I am Chair of the Section of Administrative Law and Regulatory Practice of the American Bar Association. I am also the co-chair of the ABA's Task Force on Regulatory Reform. Relevant to today's subject matter, I was the founding chair of the Section's Committee on Dispute Resolution and was for many years a member of the ABA's Presidentially appointed Dispute Resolution Committee. I wrote the reports for the Administrative Conference of the United States that underlie its recommendations concerning negotiated rulemaking, the use of dispute resolution techniques by administrative agencies, and mediator confidentiality. I also represented the ABA in the Congressional hearings leading to the enactment of both the Negotiated Rulemaking Act and the Administrative Dispute Resolution Act. In my spare moments when I am not doing all of that, I spend the bulk of my professional time as a mediator in helping to resolve complex issues involving the government.

I am here today once again to offer the strong, unequivocal support of the American Bar Association for the reauthorization of the Negotiated Rulemaking Act. The ABA formally adopted a resolution at its 1995 mid-year meeting urging Congress to "reauthorize the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act on a permanent basis." Indeed, the Association has determined that securing the "reauthorization of both [the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act] on a permanent basis [with] revisions to provisions that inhibit their wider use" is a "very important legislative priority."[1]

Background and Advantages of Negotiated Rulemaking. Rulemaking is often said to be the "legislative" side of administrative action. As the very definition of "rule" in the Administrative Procedure Act makes clear, it is the means by which agencies establish policy. These decisions can have far-reaching and significant effects and involve difficult choices that must reconcile a host of competing needs and values. For example, what is the proper trade-off between costs and safety; between mandated requirements and performance standards that allow individual choice? Although these decisions are influenced by and established on a factual record, there is rarely only one proper or rational policy decision that could emerge from those facts. Similarly, since statutes virtually always provide the agency with discretion and are usually written in general terms, the details of how the agency regulates largely lies with the agency. The exercise of discretion is by its very nature a legislative function.

Although the difficult choices that an agency must make are political in nature, the traditional procedures for developing rules pay little attention to the manner in which a legislative body legitimizes decisions. While rulemaking incorporates important aspects of the administrative, hierarchical decision making and judicial-type process, these approaches fail to take advantage of the legislative process that al-

[1] American Bar Association, *Legislative Issues*, p. 2 (October, 1995).

lows varying interests to reconcile their differences in a way consistent with public goals.

Moreover, since the typical agency's decision is based on a record, the comments received by the agency tend to be position-based, leading to polarized views: Since parties cannot participate directly in traditional rulemaking, they attempt to narrow the agency's discretion by advocating that its facts show that the agency has a limited number of options for crafting an acceptable rule. This clearly warps the information base underlying the rules. Some observers of rulemaking view the agency's position in a contested or complex rule as a difficult predicament in which the agency risks getting sued if its decisions are either too strict or not strict enough in relation to comments submitted to the record. Without any type of deliberation or interaction to help the agency prioritize the needs of the parties, many points raised by the parties become muddled and the agency tends to lose focus of the whole regulation in an attempt to focus on details. Indeed the comments often appear to be ships passing in the night. Although a legislative dialogue between the submitters of this information and the agency would clarify the record and the relationship between the issues, this lost opportunity often results in the agency losing the forest for the trees and contributes to a lack of feel for the very issues they must decide upon.

Negotiated rulemaking was developed to replicate the legislative process of having representatives of those affected sit down with the agency to resolve the major issues in a rule. The concept of Negotiated Rulemaking has substituted face-to-face negotiations by representatives with a "shop floor" expertise for the position based comments currently common in rulemaking records. Although conflict is not eliminated through the use of a process that works through consensus where, typically, each interest that is represented has a veto, the rules reward cooperation and creative problem solving. Many of these traits are vital to successful legislative negotiations. Once parties realize that their interest will be addressed by the committee charged with drafting the rule, they have the incentives to work in a collaborative—at times contentious to be sure—atmosphere, where the interests of other members are as vital as their own and therefore need to be considered by all parties, if consensus is to be reached.

One area where negotiations appear to far outweigh traditional rulemaking is in how the parties are sensitized to the needs of other participants at the table. Each party may have its own pet interest, but it cannot afford to let the entire rule go astray simply because it does not share another party's interest. Indeed, if a party concentrates too hard on getting its own tree planted in the forest, it may risk losing the forest itself, a victim to a myopic approach. Thus, while each party has to be a zealous advocate for its own position, it ignores the position of others at its own peril since the rule is a package or bundle of proposals that either sink or swim together. The group, while often having heated exchanges, also works to understand what each party needs in order to sign off on the whole rule. When divergent interests help other parties achieve their goals, the group is closer to considering and crafting a rule that truly represents the needs of everyone. As a result, the salient issues are identified, weighed in importance, the facts necessary for their resolution developed, and an agreement reached as to an entire rule.

Where a rule is successfully negotiated, the result is a proposed rule that is published for notice and comment in the Federal Register. Typically, where the proper interests have been identified and have consulted with their constituencies regarding the content and progress of the proposed rules, the rules, once released for public comment, often receive little negative feedback and indeed are often widely supported since they tend to be practical, cost effective solutions to issues that are important to the stakeholders. Even if consensus is not reached, however, the information gleaned by the committee will be valuable to the agency as it approaches the issues in a traditional rulemaking process. The technical experts who bring vast practical experience to the issues provide invaluable facts and an analysis of the issues for the agency to utilize that would not be available to the agency working from the submitted record alone. Thus, even a failed negotiation is not a true failure: the agency has been educated with high quality information from all sides of the regulated community and can, in turn craft a responsive rule that the public can react to.

Another benefit to Negotiated Rulemaking is absence of delay. Although the agency and participants will have to commit resources at the outset, the rules that result are typically cost effective, practical, and last over time. Considering the costs of litigation for both the regulated community and the government, these savings are considerable. Although the rules tend to be more stringent than the agency might have proposed itself, the rules are also more cost effective since they were drafted by persons with first hand knowledge of how the rules will work. Thus, the rules achieve the agency's mandate and the national interest, but in a way that is rational and

is supported by the stakeholders involved. The process has shown great promise in crafting effective rules on complex and highly politicized rules through a legislative-type consensus based approach. In fact, some rules negotiated are so successful, despite their contentious origins, that the regulated community, having been empowered by crafting the rule, not only accepts, but begins to implement the rule, before the proposed rule has been published.

As was clear both from the report of the Administrative Conference and the practice prior to 1990, agencies were fully authorized under existing tenets of administrative law to engage in negotiated rulemaking. But, some were reluctant to do so since they were not clear whether Congress specifically approved of it; others seemed unable to divine those principles. Further, Congress enacted several bills directing agencies to use the process in situations where the process may not have been appropriate. For those reasons and to send a clear signal that it favored the use of direct negotiations among those interested—with assurances that it would be used only in appropriate situations and that no interest would be frozen out—Congress enacted the Negotiated Rulemaking Act of 1990.[2]

Success and Support. The Act and the process has been quite a success. Some incredibly complex and controversial rules have been developed under circumstances in which it seems clear that a normal rulemaking process would have failed. As further indication of the success of the process, there has *never* been a judicial challenge to a negotiated rule that was issued by the agency intact. And, it is not uncommon to hear that a negotiated rule is being implemented even before the notice is published in the *Federal Register.*

Organizations charged with developing recommendations for improving regulatory decision making have recommended that agencies use negotiated rulemaking to address complex issues of science and risk. For example, the Carnegie Commission on Science, Technology and Government recommended that "Agencies should attempt to use negotiated rulemaking when it is possible to do so without prejudicing unrepresented third parties."[3] It continued:

> The virtues of negotiated rulemaking have been explored elsewhere. We note that the use of negotiation often saves EPA a year or two of "rulemaking" time. We join the many students of the subject who advocate the use of such procedures.

The Administration has also supported the use of negotiated rulemaking on several fronts. Its Executive Order on Regulatory Planning and Review directed agencies "to explore and, where appropriate, use con sensual mechanisms for developing regulations, including negotiated rulemaking."[4] On the same day he issued this Order, the President also directed agencies to experiment with negotiated rulemaking by trying it at least once.[5] Similarly, the Vice President's National Performance Review likewise supported negotiated rulemaking, identifying significant, major benefits: More innovative approaches that may reduce compliance costs; less time, money, and effort spent on developing and enforcing rules; earlier implementation; higher compliance rates; and more cooperative relationships between the agency and affected parties.[6]

These accolades have been borne out time and again. Interestingly—and probably counter intuitive at least initially—rules that are developed through reg neg tend to be *more* stringent than rules developed under the traditional process but at the same time cheaper to implement. The cause of this seeming paradox is that the people on the committee have a practical expertise that results in their direct ability to determine what is the best, most cost-effective means of achieving the desired result.

An example of just such a rule was OSHA's Steel Erection Negotiated Rulemaking Committee, better known as SENRAC. Steel erection is an inherently risky undertaking, and the development of a new rule to address it had been on OSHA's docket virtually since its inception. But, because the topic is also controversial, no rule was forthcoming although several attempts had been undertaken. Finally, the Ironworkers and the National Erectors Association, two organizations prominently affected by any such rule, petitioned OSHA to use negotiated rulemaking. Many who

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[2] Executive Order 12866, 58 Fed. Reg. 51735 (9/30/93).

[3] Carnegie Commission on Science, Technology, and Government, Risk and The Environment: Improving Regulatory Decision Making (1993), at p. 111.

[4] Section 6(a).

[5] Memorandum for Executive Departments and Selected Agencies and Administrator of the Office of Information and Regulatory Affairs concerning "Negotiated Rulemaking."

[6] National Performance Review, *Improving Regulatory Systems,* Recommendation 3 at pp. 29–32.

looked at the topic and its history thought it would be extremely unlikely that the parties would be able to come to agreement on a rule, but OSHA and the parties decided to give it a try anyhow.

After a lot of hard work, SENRAC did indeed come to agreement on a new standard. And, the very nature of that standard demonstrates the power of reg neg: while it started out as largely a one-issue rule, SENRAC identified far more issues that had significant effects on the workplace, and that one issue became just that—one of many. It turned out after looking at the data and full discussions among those with practical experience that there were many other, more important items that would lead to a safer workplace. I am proud to say that I served as the mediator for SENRAC, and I am confident having listened to the discussion over its life, that the standard they developed will be successful by virtually any measure.

The Negotiated Rulemaking Act Should be Permanently Reauthorized. Although it is clear that an agency can use negotiated rulemaking without a separate statute authorizing it, it is also clear that agencies feel far more comfortable relying on the specific imprimatur of Congress. They then know that if they follow the procedures of the Act—the Act is clear it does not restrict an agency's ability to use other processes—they are within a "safe harbor" approved by Congress. A failure by Congress to reauthorize the Act, therefore, would have a major, highly unsatisfactory consequence: A terrible signal would be sent that whereas at one time Congress supported developing rules by the direct participation of representatives of the affected parties, now it does not. Thus, the ABA feels it is essential that the Negotiated Rulemaking Act be reauthorized on a permanent basis.

The ABA's resolution supporting reauthorization continues: "Congress should revise provisions that inhibit [its] wider use . . . by clarifying" various points that will be discussed below. Thus, while the ABA greatly supports reauthorization, we also believe parts of the current law inhibit the broader use of mediation and arbitration to resolve issues facing the government. I would now like to turn to the provisions that we believe should be modified.

Federal Advisory Committee Act (FACA). The Federal Advisory Committee Act[7] has also inhibited the more widespread use of negotiated rulemakings. Notwithstanding the strong support of the Administration, it regularly takes several *months* for a draft charter to leave the office that wishes to use negotiated rulemaking to develop a new regulation before the charter is approved. The draft must wend its way from the sponsoring office up through the bureaucracy all the way to the head—the very pinnacle—of the agency for personalized signature; it is then shipped off to OMB and GSA for consultation and approval.

Until recently, a request to establish a negotiated rulemaking committee was counted towards the arbitrary ceiling on advisory committees that was imposed earlier by the administration.[8] Thus, to create a reg neg committee, an agency oftentimes had to abolish or terminate some other committee.[9] The delay and uncertainty in chartering committees caused a major disincentive to all but the most resolute agency officials so that this highly successful process has not been used nearly as widely as it would otherwise.

While one of the inhibitions has been addressed, the other remains. The extraordinary delay can be fixed quite simply without *any* loss: the Negotiated Rulemaking Act requires the publication of a notice of intent to form a Negotiated Rulemaking Committee that describes the topics to be taken up, the interests to be affected and represented, a proposed schedule for its activities, a description of the administrative support provided by the agency, and a request for comment from members of the public.[10] In short, the Notice of Intent provides the same information that is contained in a charter, so there is a redundancy without correlative benefit.

The ABA therefore believes that Congress should authorize agencies to establish reg neg committees without having to secure the permission of either OMB or GSA.[11] A straightforward way to do that would be to provide that publication of a notice of intent, or similar notice in the *Federal Register,* would serve in lieu of a

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[7] 5 U.S.C. App. 1.

[8] OMB Circular No. A–135 (October 5, 1994).

[9] "Given . . . the importance of reg neg as a rulemaking tool, we are hereby exempting any 'reg neg' committees from the current advisory committee ceilings established under OMB Circular No. A–135 (October 5, 1994). This policy change is effective immediately and will remain in effect until the end of the fiscal year September 30, 1997. At that time, we will review the policy's utility and decide whether it should be retained or modified." Memorandum for the Heads of Executive Departments and Agencies from Alice M. Rivlin concerning "Further Guidance on Establishing Negotiated Rulemaking Advisory Committees" dated April 8, 1996.

[10] 5 U.S.C. § 564(a).

[11] The ABA believes firmly, however, that the substantive provisions of FACA that require openness and balance should be adhered to whether or not a separate charter is required.

separate charter. The same information would be provided to the public, the same accountability would be present, but the major bureaucratic disincentive would be removed, thereby encouraging its wider use.

We would certainly agree to such an approach. There may be others, however. The Senate addressed this issue in its version of H.R. 2977 by means of the following language:

> No later than 180 days after the enactment of this Act, the Director of the Office of Management and Budget shall complete a study with recommendations on expediting the establishment of negotiated rulemaking committees, including eliminating any redundant administrative requirements related to filing a committee charter under section 9 of the Federal Advisory Committee Act and providing public notice of such committee under section 564 of title 5, United States Code.[12]

While this is a good start, we would hope such a provision would be more action oriented and stimulate a beneficial change. Moreover, as we pointed out in our testimony on H.R. 2977,[13] similar FACA problems also arise with respect to committees established to negotiate a consensus under the Administrative Dispute Resolution Act, and the ABA's resolution similarly states that these too should be exempt from separate chartering requirements.[14] The ABA therefore proposes that the Senate language be changed to the following:

> No later than 180 days after the enactment of this Act, the Director of the Office of Management and Budget shall *take appropriate action* to expedite the establishment of negotiated rulemaking committees *and committees established to negotiate agreements under the Administrative Dispute Resolution Act,* including eliminating any redundant administrative requirements related to filing a committee charter under section 9 of the Federal Advisory Committee Act and providing public notice of such committee under section 564 of title 5, United States Code *and shall, to the extent necessary, make recommendations for legislative action within the 180 days.*

There is a second, minor problem with FACA that we had thought had been addressed by the Negotiated Rulemaking Act, but which some agencies apparently are not so clear about. Section 567 of the Act contemplates that a reg neg committee will remain in existence until publication of the rule, without the need for rechartering, until the final rule is published. Some have read the language of the section[15] to mean that the committee dies at termination, not that it lives up to it, unless otherwise specified. Although we had not thought this provision is ambiguous, any doubt could be removed by changing the words "termination upon" to "continue until".

Finally, some agencies have various restrictions on the use of advisory committees. In some instances, the underlying statute spells out the composition of any advisory committee that the agency may use. In others, there is a ceiling on the number or total expense of advisory committees. These artificially interfere with either how a committee functions or whether one can be established in the first place. These prescriptions are clearly appropriate when addressing committees that vote or those that have an on-going life to provide general advice. But, they are not really applicable to a negotiated rulemaking committee that is established solely to develop a new rule by the consensus of the affected parties and that will terminate when the rule is issued. It would, therefore, be helpful if the Act made clear that the authorization to establish a reg neg committee is independent of any statutory restrictions on the establishment, funding, or operation of advisory committees.

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[12] Section 11(c).

[13] We said at that time: "The ABA believes, therefore, that the goals of the Administrative Dispute Resolution Act would be furthered by exempting any committee formed pursuant to the Act—one that necessarily would have a temporary life and a specific, defined goal—from the chartering requirements of FACA. Since they serve a role crucial for public confidence, the agency should still have to comply with FACA's substantive requirements of balance, open meetings (unless it meets one of the exceptions in the Sunshine Act), and minutes. This simple change would not result in any modification whatever of the nature and functioning of advisory committees, but it would enable agencies to use mediation and consensual processes far more widely than they do currently—surely something that is to be encouraged."

[14] Some take the position that these committees are not subject to FACA, while others disagree. In may be that the question could be clarified by an appropriate description in 41 CFR §§ 101–6.1004 that sets out meetings not covered by the Act.

[15] A negotiated rulemaking committee shall terminate upon promulgation of the final rule under consideration, unless the committee's charter contains an earlier termination date or the agency, after consulting the committee, or the committee itself specifies an earlier termination date.

Conclusion. The American Bar Association urges Congress to reauthorize the Negotiated Rulemaking Act, with the changes described above, on a permanent basis.

Mr. Gekas. Yes, we thank you.

The Chair will limit itself to 5 minutes for questioning and assign the same restriction to the other members of the subommittee.

One quick question. After the Advisory Committee met and agreed, was it the host for the negotiations?

Mr. HARTER. The committee—when OSHA decided to go forward with the negotiated rulemaking, it impaneled the Steel Erection Negotiating Rulemaking Advisory Committee, so that diverse group was a Federal advisory committee and was charged with coming up with the agreement.

Mr. GEKAS. All right. Then did all the parties agree on the wording of the proposed rules or rules and were they formulated by the Advisory Committee? Was it then submitted as an agreed rule to OSHA to promulgate?

Mr. DEAR. In essence, and that process is still going on. The OSHA staff assisted the committee. The agency was represented on the committee by a senior OSHA executive. OSHA also provided the staff support. The committee's work product is being turned over to the agency, and we will do the other parts of work required.

Mr. GEKAS. Application of the Federal Register, the whole bit.

Mr. DEAR. The detailed economic analysis that is required for standards, the requisite——

Mr. GEKAS. Is that ongoing now.

Mr. DEAR. That is going on, and we intend to publish the proposed rule by the end of this year.

Mr. GEKAS. That will mean a full year and a half from beginning to end; is that correct?

Mr. DEAR. It will be a little longer than that. We still have to formally propose this rule by going through the regular public hearing and comment process so that all those who weren't on the committee have an opportunity to participate. I guarantee you this will be much faster than the old way.

Mr. GEKAS. You say it is much faster, but we are still talking about years.

That brings me to my next question. Many people don't know the Brady law that was passed a few years back. It had an amendment which I offered and was accepted in conference when we established the final wording of that bill. It stated that the Department of Justice must within 5 years from the time of enactment of the law to promulgate a system of an instant check nationwide to supplant the waiting period provisions of the Brady law.

Since its enactment, I have been worried about how the Department of Justice is moving on this, and I am going to try to bring some people in here to testify to that in the near future, but in the meantime it dawns on me they ought to be engaging in some kind of party—parties mechanism. I like the ones you have outlined. In fact, Mr. Dear, you said you hoped other departments would adopt this kind of procedure on a regular basis. I am wondering if anyone has a comment on how best the Department of Justice could use this to help them implement what they should be implementing?

Mr. WATERMAN. Mr. Chairman I don't know the exact details of that issue or problem, but we strongly urge the greater use of nego-

tiated rulemaking. If you have an issue or standard that you would like to have promulgated, and you know how long that takes, we think that a negotiated rulemaking panel should be impaneled or instituted immediately and given 12 months. At the end of 12 months, if that committee has not come to consensus—and consensus is defined as unanimous under this act—even if you have not come to consensus, you will be light years down the road further than if any Federal agency has had it up on the third, fourth, and fifth floors kicking it from cubicle to cubicle for 12 months, and it hasn't seen the light of day yet. That is the way to go.

Mr. GEKAS. I am taking that to heart because, as I calculated, we only have about 2 years left of this 5-year period when we mandated in that amendment to the Brady law.

Mr. Harter.

Mr. HARTER. One of the enormous benefits that comes is really the ability to secure the very practical kind of experience; people who have done it, people who have particular concerns, just the very practical aspects of it. I would think in something like that you have the whole question of the technological basis of the searches; you have personal privacy, you have lots of different issues that have to both be raised and reconciled—the perfect kind of thing for the various representatives and the Government. The Government is a major participant in this; it in a great way for the Government to gain information that they never otherwise could get.

Mr. GEKAS. The time of the Chair has elapsed.

By your presence here you have volunteered to assist me in advising the Department of Justice how to proceed on this other issue.

Mr. HARTER. One of the things on the back of your driver's license; is that it?

Mr. GEKAS. That is correct.

The gentleman from Rhode Island is recognized for 5 minutes.

Mr. REED. Thank you, Mr. Chairman.

Mr. Dear, in thinking about the interchange between you and the chairman, it struck me that if you don't reach consensus, is it typical or would it be typical for the agency to gather up all of this good, productive work and then go into rulemaking right away?

Mr. DEAR. Yes. That is exactly what I told our steel erection committee. You have 12 months. If you produce a consensus proposal, I will commit the agency to publishing that proposal for comment. If you don't, we will go ahead and publish a rule using the old rulemaking method.

Mr. REED. I would assume that the rule is a product at least influenced by the deliberation so that——

Mr. DEAR. Like any negotiation, it may fail. You may lose in the last 2 percent. In the case of a regulation, that 98 percent that they have worked out is still going to be of great value. Again, it is the practicality that the field brings to the process.

Mr. REED. On a practical level, that is probably leverage which the agency has that is not written in the statute, but it is a reality that at the end of the 12 months, we will take the best of what we have heard here, and we will go forward. So, either you are with us or against us, and if you can get consensus, essentially you can

more or less bind us to put your proposal in the proposed regulation and not what we think.

Mr. HARTER. As an example of that, the very first proposed negotiated rulemaking I did was an informal one on OSHA's benzene standard in which the agency didn't participate. If you remember, that has a very bitter history. The committee didn't quite reach agreement, but OSHA was able 8 months later to issue a standard, and it was their first health standard they issued that they weren't sued on, which gives you some indication of the amount of information and practicality that can be built on that.

Mr. REED. Let me ask another question. Within the legislation there are some general criteria about determining what is appropriate for rulemaking, negotiated rulemaking or standard rulemaking, and I wondered, two questions: Just generally what are the types of cases that you think are amenable; and then more specifically, are there any changes to the legislation we have to make to be more specific, give more guidance to the agencies?

And a final point is I notice you are talking about success stories, and there are many but there are examples, for example EPA, with the lawn power tool emissions, the weedwhackers, where they failed to reach consensus, the general question would be how do we really separate these cases out, and, two, is there anything we have to do in the legislation?

Mr. Harter, do you want to go first? Then we will go down the road.

Mr. HARTER. I think the criteria that are in the legislation work pretty well as a checklist—different people use different formulations of it—but they have withstood the test of time.

I think really the ones that I—the overall test is that the ones that have a fair amount of factual basis, are driven by the facts—you can't go into a laboratory. This is a political kind of process of sharing values and working it out. Those are the kinds of standards that are very hard for an agency to issue. I think the ones that have really worked well share that quality. Though I don't particularly want to get into it right now, there are very good reasons why that EPA standard failed, and anybody who looked at it knew it.

Mr. REED. It wasn't a good topic to begin with in the first place?

Mr. HARTER. It was all right.

Mr. WATERMAN. I would still say that even if it, quote, "fails," the parties involved in this process identify and focus and bring to the forefront the issues that might not have been there had it been left solely to an agency and the standard department of that agency or whatever that department might be.

The way that regulation, at least that we see, is often generated is—and this not a criticism—the standard writers themselves. They are sitting in their office receiving correspondence and phone calls and visits from various special interest groups to either revise a regulation or institute a new regulation that more often than not has some benefit to those groups. The standard writer that has now embarked on a standard in an industry that he or she may have no knowledge of is solely trying to see the forest from the input of these self-interest groups.

At least negotiated rulemaking gives you a formal but flexible process to bring everybody in early on, and that is why I say even if you don't come to consensus, you are going to be farther along if you bring everybody on early on and identify the key areas. You may not come to an agreement, but you are much farther along than letting it languish back in the bureaucracy for literally years.

Mr. REED. Thank you.

Mr. Dear, do you have a comment?

Mr. DEAR. Negotiated rulemaking, we are very positive about it. It is not a panacea. There are certain issues that OSHA deals with and other regulatory agencies deal with that negotiated rulemaking would not work well for. The criteria in the act currently do describe, I think, quite well the tests that need to be applied to determine if negotiated rulemaking is a viable prospect.

I would urge the committee to consider two changes that would help decrease the amount of time it takes to form up these committees, because once you have the willingness of parties to agree there is a problem, agree there is a necessity to come up with a solution, and the willingness to do that, the concurrent review of the Federal Advisory Committee Act adds time to the chartering of the committee.

It is really unnecessary. I think it could be eliminated. The acquisition of the services of a facilitator of a convenor are currently subject to normal Federal procurement rules. That could be adjusted so they could be selected like experts off of an expert witness list, for example, and that would also decrease the time.

But my experience with steel erection has caused me to believe where this could be used and this should be, and we have already announced a second negotiated rulemaking for fire protection in the shipyard industry. Subject to funding, we will continue to look for opportunities and use this very valuable tool.

Mr. REED. Thank you very much. Mr. Chairman, thank you.

Mr. GEKAS. We negotiated the end of the time of the panel. So we thank you very much. It has been very helpful and will be helpful in the future. Thank you.

The final panel consists of two witnesses who, as you can see, have considerable experience in the realm we are undertaking today. Wilma Liebman, Esq., is the Deputy Director for National Office Operations of the Federal Mediation and Conciliation Service. We have previously heard testimony from that agency with respect to the Administrative Dispute Resolution Act.

Before joining the Conciliation Service in January 1994, Ms. Liebman was labor counsel for the Bricklayers & Allied Craftsman, legal counsel for the International Brotherhood of Teamsters, and a staff attorney with the National Labor Relations Board.

She is joined at the witness table by Mr. Neil Eisner, the Assistant General Counsel for Regulation and Enforcement of the Department of Transportation. I note Mr. Eisner testified before our subcommittee in 1989 on the original authorization on negotiated rulemaking. The Department of Transportation had participated in negotiated rulemaking long before the enactment of the legislation, and they have a guest at the table who is——

Ms. LIEBMAN. Yes, I would like to introduce Mr. John Wagner, who is the Director of the Federal Mediation and Conciliation Service Alternative Dispute Resolution Office.

Mr. GEKAS. And we welcome him to the witness table.

We will begin with Ms. Liebman.

STATEMENTS OF WILMA B. LIEBMAN, DEPUTY DIRECTOR, FEDERAL MEDIATION AND CONCILIATION SERVICE

Ms. LIEBMAN. Thank you very much, Mr. Chairman, Congressman Reed, and thank you for the opportunity to participate in this hearing. We are delighted that you are considering reauthorization of the Regulatory Negotiation Act together with the reauthorization of the Administrative Dispute Resolution Act. We welcome this unique opportunity to try to resolve these two issues together and prevent a lapse in the regulatory negotiation law. These two laws present two success stories in creating a government that works better and costs less.

By way of background let me mention that the Federal Mediation and Conciliation Service was created by Congress in 1947. It was directed to provide mediation, conciliation and arbitration services to labor and management. Our services are direct, voluntary and customer-driven. We perform no regulatory functions at all. We have engaged in alternative dispute resolution service outside of the labor/management arena since the early 1970's.

There are approximately 200 mediators located in 75 cities around the country who bring to this work their skills and expertise in mediation, dispute resolution and consensus building. Our charter expanded in 1990 with the enactment of the ADR Act and Regulatory Negotiation Act.

FMCS is a strong proponent of regulatory negotiations, and we strongly support reauthorization of the act. Regulatory negotiations, in bringing together the regulators and the regulated, helps agencies make better rules more quickly. It reduces litigation and therefore conserves precious government resources of time and money.

The regulatory negotiation process brings life to rulemaking. It allows people to deal with each other rather than simply with paper. The coming together of interested parties, whether or not they reach consensus on a final rule, produces a greater scope of knowledge and understanding, improved communications and often a narrowing of disputed issues. Without reauthorization of the law, we fear that agencies may be less inclined to engage in the process.

The Federal Mediation Service has played a very active role in providing neutral convenors and facilitators for regulatory negotiations. Our mediators have demonstrated their capacity to convene and facilitate complex multiparty disputes. Let me just give you a few examples.

We are currently engaged in six regulatory negotiations. We have successfully handled rules to provide handicap access to airtravel, to provide safety protection for railroad maintenance crew workers.

We are just finishing up work on a negotiation involving 48 Native American tribes with the Department of Health and Human Services, and the Bureau of Indian Affairs of the Department of In-

terior. This involved issues of self-governance and the transfer to tribal governments of health and education services.

We have also recently been involved in a negotiation involving the new Don Pedro Dam, which involved water resources for the San Francisco Bay area. There were 23 parties involved in that negotiation, including the Federal Energy Regulatory Commission.

FMCS endorses recommendations which were made to Congress in October 1995 by the Administrative Conference of the United States. Those recommendations are embodied in the Senate bill. Very quickly, they provide, No. 1, permanent reauthorization of the Regulatory Negotiation Act. No. 2, we endorse a recommendation which would reassign the responsibilities which the Administrative Conference performed by providing that the President shall designate a single agency or establish an interagency committee to facilitate and encourage agency use of regulatory negotiations.

I would add that the Federal Mediation Service worked closely with the Administrative Conference previously, and we have assumed some of the responsibilities since they went out of business, including providing a clearinghouse of information on this process, providing training, and we are ready, willing and able to assume any responsibilities which this Congress or the President might delegate to us.

No. 3, we support a mechanism which would allow agencies to use private funds to support this process. That will make the process more affordable and presumably more appealing.

No. 4, we endorse a provision which would exempt regulatory negotiation committees from the Federal Advisory Committee Act, in particular the charter requirements. These requirements are burdensome and time-consuming, an unnecessary bureaucratic step; however, we heartily endorse the substantive sunshine principles of open and public meetings.

No. 5, we endorse measures which would expedite the hiring of neutral convenors and facilitators by eliminating the requirement for competitive bidding procedures in obtaining neutral services.

And No. 6, we would urge Congress not to place provisions in specific substantive statutes which would make the regulatory negotiation process mandatory. We believe that the process should be voluntary and that each case should be weighed on its own merits.

In closing, the Federal Mediation Service sincerely hopes this bill will be enacted into law during this session of Congress. It makes sense. It is a good idea. It is good for Government, it is good for taxpayers, it is good for the courts, it is good for people who have disputes with Government. In short, we think it is a win-win idea. I thank you.

[The prepared statement of Ms. Liebman follows:]

PREPARED STATEMENT OF WILMA B. LIEBMAN, DEPUTY DIRECTOR, FEDERAL MEDIATION AND CONCILIATION SERVICE

Mr. Chairman and Members of the Subcommittee, it is my pleasure to be here to offer the strong support of the Federal Mediation and Conciliation Service for the Negotiated Rulemaking Act of 1990 and its reauthorization in consolidation with the Administrative Dispute Resolution Act. FMCS was created as an independent agency by Congress in 1947 through enactment of the Taft-Hartley Act, which directed the agency to provide voluntary mediation, facilitation, and arbitration services to labor and management.

Since that time, our charter has been expanded by a variety of subsequent statutes, making it the nation's premier body for the resolution of labor-management disputes and, of particular importance here, a key entity providing alternative dispute resolution (ADR) services to other federal and state agencies. FMCS is a neutral agency that performs no regulatory functions. Its services are direct, voluntary, and customer driven. FMCS' work in alternate dispute resolution was expanded by enactment of the ADR Act as well as the Negotiated Rulemaking Act of 1990, which is scheduled to sunset on November 29, 1996.

In 1983, FMCS facilitated one of the earliest regulatory negotiations ever held with the Federal Aviation Administration (FAA). Nicholas Fidandis, an experienced FMCS mediator, met with representatives of labor, industry, consumers, and the FAA. Where three attempts to revise flight and rest time requirements for domestic airlines using traditional procedures had failed, the regulatory negotiation process allowed the parties to reach consensus on most issues within three months. The final rule that emerged from the negotiations was uncontested. Since then, the FMCS has assisted other agencies in the Negotiated rulemaking process more than 20 times.

Our agency has continually expressed its support for the negotiated rulemaking process. In May of 1989, Robert P. Baker, then Acting Director of the FMCS, testified before this body in favor of the use of regulatory negotiations, under what was then the Negotiated Rulemaking Act of 1989. In his testimony, he praised regulatory negotiation because it brings life to the rulemaking process, allowing people to deal with other people rather than with paper. He noted that the coming together of interested parties, whether or not they reach consensus, produces a greater scope of knowledge and understanding.

Negotiated rulemaking, sometimes known as regulatory negotiation or "reg neg," is a process for developing federal regulations by consensus. It is one of a range of consensus building procedures used by agencies to supplement the informal rulemaking provisions of the Administrative Procedure Act (APA), 5 U.S.C. §553. The APA's provisions require an agency to give the public notice of a proposed rule and an opportunity to file comments.

Traditionally, most agencies implement regulations by drafting a proposal and then seeking public comment on it before adopting a final rule. Under the reg-neg process, on the other hand, public participation begins much earlier, as the proposed rule is developed. An agency that intends to develop a regulation invites representatives of interests likely to be affected by the regulation to work cooperatively with each other and the agency, by forming a committee to develop a consensus draft of the text of a proposed regulation. To assist the committee in face-to-face negotiations, the process uses a neutral facilitator, who aids all parties in reaching a consensus. The proposed rule is subsequently offered to the public for comment under normal rulemaking procedures.

The reg-neg process encourages cooperative and creative problem solving. It promotes public participation in agency rulemaking; and if consensus is reached, reg-neg can result in better regulations, based on information known to all parties.

Federal agencies possess the authority to engage in negotiated rulemaking under their enabling statutes and the Federal Advisory Committee Act, and a few agencies have used reg-neg for more than a decade. However, prior to passage of the Negotiated Rulemaking Act of 1990, 5 U.S.C. §§561–570, many agencies were not using it, at least in part because of their unfamiliarity with the mechanics of the process and uncertainty about their authority to use reg-neg. The Negotiated Rulemaking Act received strong bi-partisan support in Congress which began to encourage more and more agencies to experiment with the process.

The Administration has strongly endorsed the use of negotiated rulemaking through recommendations of the National Performance Review and the provisions of Executive Order 12866 (October 1993), which addressed procedures for regulatory planning and review. On the same day that the President signed the Executive Order, he also issued a directive to heads of 18 departments and agencies to choose at least one rule for development through reg-neg. In the year following, agencies starting new negotiated rulemaking procedures included the Health Care Financing Administration, the Federal Railroad Administration, Federal Communications Commission, Department of Housing and Urban Development, Department of the Interior, and Department of Education. FMCS has had a very active role providing convenors and mediators for several regulatory negotiations, such as for the Department of Transportation (railway safety issues and automobile headlight emissions) and the Department of Housing and Urban Development (vacant housing), as well as for a public policy process for the Federal Energy Regulatory Commission (environmental issues related to the New Don Pedro Dam Project).

In March 1995, the President renewed his encouragement with a memorandum directing agencies to identify rulemaking proceedings that could be converted to negotiated rulemakings. By the end of 1995, eleven negotiated rulemakings had been completed. Today, over half a dozen agencies are engaged in negotiated rulemaking including the National Park Service, the Federal Highway Administration, Pension Benefit Guaranty Corporation, Department of Housing and Urban Development and the Equal Employment Opportunity Commission.

As explained below, FMCS endorses the Administrative Conference's recommendations as set out in its report to Congress, dated October 1995, at pages 31 and 32 (see attached). FMCS agrees that the Negotiated Rulemaking Act of 1990 should be permanently reauthorized. This is accomplished in S1224 Sec. 11(a) by repealing the sunset provision, Section 5 of the Negotiated Rulemaking Act of 1990 (Public Law 101–648; 5 U.S.C. 561 note).

Sec. 11 (B) (a) of the Senate bill states that the President shall designate an agency or designate or establish an interagency committee to facilitate and encourage agency use of negotiated rulemaking. Either approach has merit. FMCS has over a decade of experience assisting agencies with establishing and conducting negotiated rulemakings. It worked extensively with the Administrative Conference, the agency formerly named in the Reg-Neg Act of 1990, 5 U.S.C. § 569, to provide training in negotiated rulemaking and to provide information and assistance to agencies in forming a negotiated rulemaking committee and conducting negotiations on a proposed rule.

Since the demise of the Administrative Conference in 1995, the FMCS has obtained some of its resources and assumed much of that agency's ADR responsibilities. The FMCS now serves as a clearinghouse of information to assist agencies in negotiated rulemaking. FMCS also provides training to government personnel on the techniques and procedures of negotiation. In the recent Senate and House versions of the ADR bill, FMCS was asked to assist in the establishment of procedures to help agencies obtain the services of conveners or facilitators more rapidly. These are all functions previously performed by the Administrative Conference. Therefore, an interagency committee with permanent agency participants such as FMCS, as well as rotating agency members, would facilitate and encourage agency use of negotiated rulemaking.

Sec. 11 (B) (b) of the Senate bill amends 5 U.S.C. § 569(g) to provide a mechanism that will allow agencies conducting negotiated rulemaking to make use of any private funds that may be made available to support the process. FMCS fully endorses this amendment as it will lessen the costliness of the reg-neg process and thus, encourage more agencies to consider its use.

FMCS also endorses the Conference's conclusion that negotiated rulemaking committees established under the Negotiated Rulemaking Act should be exempted from provisions of the Federal Advisory Committee Act (FACA) and supports the sense of the Senate bill on the same issue. While the Administration supports the sense of the Senate bill on the same issue, substantive legislation is not needed to carry this out because the Administration has already exempted negotiated rulemaking from the FACA cap under an April 4, 1996, memo from the OMB Director to the Heads of all Executive Departments and Agencies. This will expedite the establishment of reg-neg committees and eliminate redundant administrative requirements related to filing a committee charter under section 9 of the Federal Advisory Committee Act and annual reporting requirements.

FMCS endorses measures in the Negotiated Rulemaking and other Acts that will expedite the hiring of convenors and facilitators.

Lastly, FMCS agrees with the ACUS recommendation that Congress avoid placing requirements in specific substantive statutes that agencies use negotiated rulemaking for particular rules or programs. The determination whether or not to engage in a reg-neg should depend on whether the affected interests are able to participate, the availability of resources, and whether the procedure will be effective in the context of a specific proposed rule.

In conclusion, FMCS supports Congressional encouragement of negotiated rulemaking through the reauthorization of the Negotiated Rulemaking Act of 1990. Mr. Chairman, thank you for the opportunity to participate in this hearing and submit testimony for the record.

Building Consensus in Agency Rulemaking:

Implementing the Negotiated Rulemaking Act

Report of the Chairman
of the
Administrative Conference of the United States
on Agency Implementation of the
Negotiated Rulemaking Act

October 1995

Thomasina V. Rogers
Chair

David M. Pritzker
Project Manager

Chapter Four
Recommendations

I. Reauthorization of the Negotiated Rulemaking Act

The Negotiated Rulemaking Act provides useful support and guidance for agencies that use reg-neg. Moreover, the Act has given the process a consistent framework and an express congressional endorsement for those agencies that were previously unwilling to give serious consideration to its use. There appear to be no real disadvantages in renewing the Act permanently. (See Chapter Three, section III.K.)

RECOMMENDATION

The Negotiated Rulemaking Act of 1990 should be permanently reauthorized. Section 5 of Public Law No. 101-648 should be repealed.

II. Should Negotiated Rulemaking Be Exempted from the Federal Advisory Committee Act?

Agencies have found the *chartering and approval process* for committees under the Federal Advisory Committee Act (FACA) and Executive Order 12838 to be burdensome and unnecessary for negotiated rulemaking committees. Such committees are normally created for a single, specific purpose, and are terminated upon completion of their assignment. In contrast, the *openness provisions* of FACA provide the public with assurance that the committee's recommendations are arrived at fairly, openly and with appropriate public participation and oversight. (See Chapter Three, section III.B.)

RECOMMENDATION

Negotiated rulemaking committees established under the Negotiated Rulemaking Act should not be subject to the provisions of the Federal Advisory Committee Act. Instead, the openness, balance, public notice, and recordkeeping provisions of the Federal Advisory Committee Act, as well as any other provisions of that Act that are appropriate for negotiated rulemaking committees, should be incorporated explicitly in the amended Negotiated Rulemaking Act. The chartering and annual report procedures for other types of advisory committees should not be applicable to negotiated rulemaking committees. Each agency head should have final authority for determining whether or not an agency may form a new committee specifically for the limited purpose of carrying out a negotiated rulemaking proceeding.

III. Should Negotiated Rulemaking Be Mandated?

It is preferable for Congress to allow agencies the flexibility to use negotiated rulemaking in appropriate situations, rather than to mandate it. The experience to date suggests that requiring the use of reg-neg by statute short-circuits several important steps of the convening process and can make the entire procedure less likely to be an effective use of agency and private sector resources. As an alternative, Congress may wish to consider providing incentives to use the process, such as reducing any requirements for cost-benefit analysis for negotiated rules. (See Chapter Three, section III.J.)

RECOMMENDATION

Congress should generally avoid placing requirements in specific substantive statutes that agencies use negotiated rulemaking for particular rules or programs. If Congress nevertheless desires to mandate use of reg-neg procedures, some effort should be made prior to enactment of the requirement to ascertain whether all of the affected interests are willing and able to participate in such a proceeding. Also, Congress should consider whether any

other procedural requirements in the relevant programmatic statutes will have a negative impact on the use of reg-neg in the particular circumstances. Furthermore, Congress should not mandate reg-neg procedures (such as time limits) that differ substantially from those in the Negotiated Rulemaking Act.

IV. Neutrals

Agencies using negotiated rulemaking continue to need simplified procedures for acquiring the services of neutral facilitators and convenors. (See Chapter Three, section III.G.)

RECOMMENDATION

(a) Congress should ensure, through the oversight process or other appropriate means, that agencies likely to use negotiated rulemaking have adequate authority and procedures in place to implement the simplified contracting provisions of the Federal Acquisition Streamlining Act with respect to acquiring the services of facilitators and convenors.

(b) Congress should provide that agencies may employ their small purchase authority to contract for services of facilitators and convenors from not-for-profit entities as well as small businesses, which by statutory definition are limited to for-profit entities.

V. Responsibilities of the Administrative Conference

The coordination and assistance functions assigned to the Administrative Conference by the Negotiated Rulemaking Act (see Chapter One, section V) have been valuable for agencies using the reg-neg process, especially for agencies with limited or no experience with reg-neg. In view of the termination by Congress of funding for the Administrative Conference, Congress may wish to consider reassigning some of these responsibilities to an appropriate entity or entities within the federal government.

RECOMMENDATION

(a) If Congress decides to reassign any of the Administrative Conference's responsibilities for coordinating agency conflict resolution activities, assisting agencies, or maintaining a roster of neutrals available to serve as convenors or facilitators for negotiated rulemaking, these roles should be given to an entity or entities that will be perceived as impartial with respect to both the source of any neutrals hired and the substance of any negotiations.

(b) Congress should amend 5 U.S.C. §569(g) to provide a mechanism that will allow agencies conducting negotiated rulemaking to make use of any private funds that may be made available to support the process.

Federal Mediation and Conciliation Service

Alternative Dispute Resolution Services

Office of ADR Services
2100 K Street, NW
Washington, D.C. 20427
(202) 606-5445

ALTERNATIVE DISPUTE RESOLUTION (ADR)

FMCS's involvement in Alternative Dispute Resolution (ADR) activity dates back to the early 1970's when the agency was asked to mediate a land dispute between the Navajo and Hopi Indian tribes. In the early 1980's, FMCS facilitated the first regulatory negotiations held by the Federal Aviation Administration. Regulatory negotiation activity increased throughout the decade, with FMCS involved in negotiations held by the Departments of Transportation, Agriculture and others. FMCS also began providing mediation services for Home Owner Warranty disputes and in training volunteer mediators for the Farm Credit Administration. Since the mid-1980's, FMCS's work in ADR has steadily expanded to include mediation in contract disputes, regulatory development, whistleblower complaints, EEO/workplace grievances, grants and environmental issues.

Since FY 1990, FMCS has entered into approximately 250 agreements with federal agencies to provide ADR services. Our ADR activities have covered nearly every imaginable type of conflict the government has experienced. More recently, FMCS's Alternative Dispute Resolution program significantly expanded due to the increased demands for ADR services throughout the Federal government and in response to President Clinton's Executive order 12871 on labor-management partnerships. Federal agency offices across the country have sought help from FMCS in a wide range of ADR activities. In response, FMCS has done the following:

Organizational Changes

Organizationally, FMCS has taken the following steps to meet the challenges and growing demands of the federal community for ADR services.

Office of ADR Services

In 1994 the Office of ADR Services was established to coordinate nationwide ADR activity for FMCS. The office is managed by a director whose staff includes an ADR mediator, ADR specialist, training specialist, assistant program specialist and a secretary.

ADR Coordination

In each FMCS Region the two Directors of Mediation Services have been given responsibility to coordinate ADR activity with the office of ADR Services in Washington. Those responsibilities include monitoring the needs of the federal community within the Region's geographic area; assisting field mediators in the design and delivery of various ADR programs; and communicating with our national office on the status of ADR activities within the region.

Field Mediators

FMCS employs approximately 200 full-time mediators, whose primary responsibility is serving the collective bargaining needs of the private and public sectors. In many ways, mediation and ADR have become synonymous terms for the general public. However, for FMCS, which regularly provides mediation services, ADR is defined as anything other than our traditional labor-management related activity. It has been the practice of the agency to regularly involve field mediators in our ADR program. To date nearly 40 percent of our mediator workforce has been involved in ADR projects.

Services to Clients

FMCS has focused its ADR services in five primary areas:

Consultation -- initial assessment of a client agency's needs.

System Design -- analysis of existing mechanisms and design of appropriate methods and strategies for implementing ADR.

Education/Training/Mentoring -- programs for educating the general user of ADR services, training in mediation skills for potential mediators, and actual mentoring of mediator trainees through active cases.

Mediation/Facilitation and Convening Services -- FMCS is available on contract to agencies to provide mediation, facilitation and convening services for all types of disputes, depending on FMCS resource availability.

Evaluation and Follow-up -- Assessment of ADR programs and continuing involvement to improve ADR initiatives.

The following list represents these ac ivities in terms of most to least frequently requested:

1. mediation skills training (2-5 days)
2. ADR education/awareness programs (1/2 - 1 day)
3. mediation/facilitation
4. mentoring assistance
5. systems designs
6. regulatory-negotiations
7. evaluation

Regulatory Negotiations and Public Policy Disputes
Fiscal Year 1995

Departments of Interior/Health and Human Services -- In the largest regulatory-negotiations process ever held, four FMCS mediators worked with a committee of over 60 representatives to develop regulations implementing the Indian Self-Determination and Education Assistance Act.

Department of Housing and Urban Development -- FMCS mediators convened and assisted the Department of Housing and Urban Development and a committee consisting of public housing association representatives in developing regulations to determine the rate at which subsidies are paid on housing projects for vacant units.

Department of Transportation -- FMCS mediators convened and worked with the Department of Transportation and representatives of the auto industry in defining measurements for measuring headlight emissions.

Federal Energy Regulatory Commission -- FMCS mediators convened and facilitated a large, complex dispute over the development of water resources in the Bay area of San Francisco.

Department of Interior -- FMCS mediators assisted the Department of Interior and a committee representing Native American tribal leaders in developing regulations on self-governance issues.

Department of Transportation -- The Federal Railroad Safety Administration received assistance from FMCS mediators who successfully facilitated negotiated rulemaking on rail maintenance crew safety.

Other Examples of Major Fiscal Year 1995 ADR Contracts:

Department of Health and Human Services -- FMCS has been under an exclusive contract with HHS to mediate age discrimination cases since 1980. During that period, FMCS mediated on average 60-80 cases per year. In Fiscal Year 1995 that average nearly doubled to over 135 cases.

Department of Education -- For several years the Service has been under contract to provide mediation services for the recovery of grant funds in disputes with state school systems. Since Fiscal Year 1991, over thirty such cases, involving millions of dollars, have been mediated.

Office of Personnel Management -- FMCS has been instrumental in assisting OPM in the design, development and piloting of its two and five day courses on ADR. The two-day program is given around the country and the five-day course is part of management training at the Western Management Development Center in Denver.

Department of Transportation -- FMCS has launched a major initiative to implement ADR in resolving EEO disputes. The project included complete systems design, mediator training, and mentoring activity.

Department of the Air Force -- FMCS facilitated a systems design workshop for senior level Air Force managers in designing and implementing ADR systems for EEO and personnel disputes.

Department of State -- FMCS mediators lead the first ever mediation training program for internal State Department mediators.

Department of Energy -- FMCS is under contract to mediate whistleblower disputes for the Department. Currently restricted to the Southeast region, the program is expected to expand in Fiscal Year 1996.

Partial Listing of Other Agencies That Have Contracted With FMCS For ADR Services in 1995:

Federal Aviation Administration
Department of Commerce
Department of Labor
National Park Service
Department of Defense Office of Hearings and Appeals
Pittsburgh Federal Executive Board
Minerals Management Services
State Department
Immigration and Naturalization Service
Department of Justice
Naval Sea Command
Internal Revenue Service
Fish and Wildlife Service
Library of Congress
Environmental Protection Agency
Defense Mapping Agency

ALTERNATIVE DISPUTE RESOLUTION
REGULATORY/MULTI-PARTY NEGOTIATIONS

This is a time of growing concern about the fiscal impact of federal policies and regulations on businesses, workers, and the public. The Administrative Dispute Resolution Act of 1990 and the Negotiated Rulemaking Act of 1990 authorize FMCS to use its mediation expertise to bring together regulators and those who will be affected by regulations or policies to formulate proposed rules or policies through negotiation. As a neutral third-party, FMCS convenes and facilitates complex, multi-party procedures to help produce draft rules and policies by consensus.

The New Don Pedro Project

The New Don Pedro Project is a large volume storage reservoir in the Tuolumne River Basin of California, licensed by the Turlock and Modesto Irrigation Districts to store water for irrigation and municipal water supplies. By exchange agreement, the city of San Francisco also stores water in the reservoir. The project license required reevaluation of the allocation of water from the reservoir, studies to be performed and submitted to the Federal Energy Regulatory Commission (FERC), and an environmental assessment outlining the impact of various changes in the amount of water release.

Anticipating that a large number of private and public sector organizations with diverse concerns and strongly-held points of view would intervene in the issue, FERC asked FMCS to mediate a series of settlement meetings with FERC and the intervenors to attempt to reach consensus and resolve issues surrounding modification of water flow requirements. The interested parties included:

- California Department of Fish and Game
- California Sports Fishing Protection Alliance
- City and County of San Francisco
- Federal Energy Regulatory Commission
- Friends of the Tuolumne
- Modesto and Turlock Irrigation Districts
- San Francisco Bay Area Water Users Association
- Tuolumne River Preservation Trust
- U.S. Fish and Wildlife Service

FMCS mediators prepared a convening report outlining the scope of the issues and the problems that needed resolution.

Training in consensus decision-making and Interest-Based Bargaining was then conducted for all participants. The actual negotiations took place over a ten-month period of three to four-day mediated sessions per month, and involved more than forty participants negotiating fifteen major issues. A settlement agreement was reached in April 1995, signed by nine of the ten interested parties, and has just been reviewed by the U.S. Fish and Wildlife Service to ensure that the terms comply with Endangered Species Act.

All parties are scheduled to convene for a "formal" adoption this Spring.

National Highway Transportation Safety Administration

Among safety complaints from the public to the National Highway Transportation Safety Administration (NHTSA) of the U.S. Department of Transportation, the highest number deal with misaimed headlamps on automobiles. No pertinent regulations currently exist, and with the proliferation of imported cars on American roads, it has become more of a problem. European and Japanese manufacturers typically use visual headlight aiming, while U.S. carmakers use optical-mechanical equipment.

Previous attempts to establish a worldwide standard for headlight beam patterns have failed. This time NHTSA brought in FMCS to convene and facilitate a series of meetings which include representatives from consumer safety organizations, headlamp manufacturers, U.S., European, and Japanese automobile manufacturers, traffic engineers, roads sign manufacturers and the auto repair industry.

To date, five sets of meetings have been held, two more are scheduled for March and April 1996, and the participants believe that draft regulations can be finalized by May 1996.

Bureau of Indian Affairs/Department of Health and Human Services

As the federal government continues to devolve responsibility for programs and funding to local governments, policies and regulations outlining responsibilities for their transfer and administration must be developed. The Bureau of Indian Affairs of the U.S. Department of the Interior and the U.S. Department of Health and Human Services are using FMCS mediators to conduct a series of meetings involving the

transfer of authority and funding for a number of health and education programs to forty-eight Native American Tribal governments.

No regulatory negotiation involving two federal agencies and so many sovereign outside parties has ever been attempted before. The process actually began before the first meeting of all participants as members of the FMCS mediation team worked separately with the parties to fully prepare them.

The public meetings began in March 1995, and have continued on a regular basis since. Facilitators believe that the group can achieve consensus on all issues and conclude by May 1996.

Mr. GEKAS. We thank the lady, and we now turn to Mr. Eisner, who is to the rulemaking process of negotiations what Ben Franklin was to the Constitution.

STATEMENT OF NEIL EISNER, ASSISTANT GENERAL COUNSEL, REGULATION AND ENFORCEMENT, DEPARTMENT OF TRANSPORTATION

Mr. EISNER. Thank you, Mr. Chairman. I will assume the presence of the red light doesn't mean my time is already up.

Mr. Chairman and members of the committee, my name is Neil Eisner, the Assistant General Counsel for Regulation and Enforcement, Department of Transportation. It is a pleasure to have the opportunity to be here today to testify about the reauthorization of the Negotiated Rulemaking Act. As with the other witnesses, with your permission I will just summarize my official statement.

The Department of Transportation, as you noted, Mr. Chairman, has been at the forefront of this process for a long time, and we strongly support the use of negotiated rulemaking and have been actively involved in encouraging its use for many, many years. Our strong support for the process is based on our long and successful experience with it.

In 1983, with the excellent support of the Federal Mediation and Conciliation Service, the Department of Transportation conducted the first regulatory negotiation in the Federal Government. We conducted three more over the next several years. Then during the last 2 years, we have significantly increased our efforts in response to our positive experience with the process as well as Clinton administration initiatives encouraging the use of the process.

I am proud to note we completed one negotiation last year. We are currently in the middle of two more. We published a notice seeking comment on starting a fourth. We expect to shortly publish notice on starting a fifth and are considering two additional projects we hope to start in the near future.

In addition to these ad hoc regulatory negotiation committees, based at least partly on the success they had with negotiated rulemaking, two of our operating administrations, the Federal Aviation Administration and the Federal Railroad Administration, have created standing advisory committees to negotiate a number of projects on an ongoing basis.

The first of these standing committees established by the FAA was started in 1992 to engage in what is essentially multiple negotiated rulemakings on a broad range of issues. The FAA submits dozens of projects to the ARAC, including many nonrulemaking actions such as the development of advisory circulars, a form of guidance material. The agency has already issued 19 proposed or final rules as a result of recommendations it has received from this committee.

In addition, the Federal Railroad Administration, after its initial success with the process this spring, established a Railroad Safety Advisory Committee and has assigned four projects to this committee already and is in the middle of negotiations on those four.

It should be apparent from the extent to which we are using the process that our experience with regulatory negotiation has been very positive. For the reasons many of the other witnesses have

elaborated on in listing the advantages of regulatory negotiation, we have done many, successful rulemakings with this process.

But in response to a question that Mr. Reed asked earlier, I would note that we have also found the process to be very valuable even when we do not achieve consensus on a final product. The Department also recognizes, however, that the process can add costs and time to the initial stages. These extra costs may be well worth it over the long term; however, upfront costs are harder to assume in these times of limited budgets.

Various constraints also make it difficult to add the extra step of negotiation. For example, we may have deadlines for issuing rules, and the initial stages involving regulatory negotiation, may add too much time for us to meet the deadline. As a result, we at the Department have encouraged a variety of steps to keep costs low and to expedite the establishment of committees within the Department and are finding some of these to be very helpful.

We also believe that the provisions contained in S. 1224 may provide valuable assistance to agencies by allowing them to accept gifts that will help them conduct these negotiations. We also believe that provisions in the bill for a study may lead to further improvement that could help expedite the process.

The Department agrees with the general purpose of the Negotiated Rulemaking Act, which is to encourage agencies to use the process when it enhances informal rulemaking. As we said before, we do not believe that the act provided us with any additional authority, but rather it generally codified the existing practice of those agencies that were using the process, it encouraged others to use the process, and it provided a general framework for the process.

With respect to encouraging the use of the process, we note that the former Administrative Conference of the United States played a very, very valuable neutral role in this regard and provided an awful lot of helpful guidance and training. For that reason we also support provisions in the bill that would have the President designate an agency or establish an interagency committee to continue these functions.

We have benefited from the use of regulatory negotiations, and the Department strongly supports the reauthorization of the act, and we continue to encourage this valuable alternative form of dispute resolution.

I appreciate the opportunity to testify here today, and I would be glad to take any questions you may have.

[The prepared statement of Mr. Eisner follows:]

PREPARED STATEMENT OF NEIL EISNER, ASSISTANT GENERAL COUNSEL, REGULATION AND ENFORCEMENT, DEPARTMENT OF TRANSPORTATION

Mr. Chairman and members of the committee, my name is Neil Eisner. I am the Assistant General Counsel for Regulation and Enforcement at the Department of Transportation, and it is a pleasure to have an opportunity to be here today to testify on the Reauthorization of the Negotiated Rulemaking Act of 1990.

The Department of Transportation strongly supports the use of negotiated rulemaking. I was the Department's representative on the Administrative Conference of the United States when the Conference issued two sets of recommendations on regulatory negotiation, and I participated in their development. I have also been actively involved in a number of ongoing efforts over the years to encourage the use of regulatory negotiation. Finally, in 1989, I testified before Congress when it was consider-

ing the original Negotiated Rulemaking Act and noted our positive experience with the process up to that time.

The Department's strong support for the process is based on our long and successful experience with it. In 1983, the Department of Transportation conducted the first regulatory negotiation in the Federal government and conducted three more over the next several years. During the last two years, we have significantly increased our efforts in response to our positive experience and to Clinton Administration initiatives encouraging use of the process. Having completed one negotiation last year, we are currently in the middle of two more, have published a notice seeking comment on starting a fourth, expect to shortly publish a notice on a fifth, and are considering two additional projects.

The issues involved in these negotiations cover a broad range. For example, we have successfully negotiated a uniform system for parking for the handicapped and oil spill response planning requirements for vessels. We are currently reviewing public comment on negotiated proposed standards to protect railroad employees working on or near railroad tracks. Finally, we have recently completed negotiations over proposed safety requirements for automobile headlight aim ability and anticiipate issuing a notice of proposed rulemaking in the near future.

In addition to these ad hoc regulatory negotiation committees, based at least partly on the success they had had with negotiated rulemaking, two of our operating administrations have created a standing advisory committee to negotiate a number of projects on an ongoing basis. The first of these standing committees was established by the Federal Aviation Administration (FAA) in 1992 to engage in what is essentially multiple negotiated rulemakings on a broad range of aviation issues. The goal of this committee, the Aviation Rulemaking Advisory Committee (ARAC), has been to develop regulatory and other solutions to aviation issues in a consensus atmosphere. Approximately 400 persons from all parts of the aviation community and the FAA are engaged in this effort. If ARAC decides that a new or revised regulation is the appropriate response to a particular issue assigned to it, it is the job of a working group to develop a draft notice of proposed rulemaking for consideration by the full advisory committee. If the ARAC agrees with the draft, the document is presented to the FAA in the form of a formal recommendation. The FAA submits dozens of projects to ARAC, including many non-rulemaking actions such as the development of advisory circulars (a form of guidance material). The agency has already issued 19 proposed or final rules as a result of ARAC recommendations. In addition, the Federal Railroad Administration, after its initial success with negotiated rulemaking, decided to emulate the FAA and this past spring established the Railroad Safety Advisory Committee (RSAC). Four projects have been assigned to the RSAC, and the committee is in the middle of negotiations on them.

It should be apparent from the extent to which we are using the process that our experience with regulatory negotiation has been positive. As I testified in 1989—if the negotiations are properly set up—for example, all of the appropriate parties are invited to participate—the process can be helpful even if it does not result in the ultimate objective of full consensus on all issues. The opportunity to discuss issues and problems in a relatively nonadversarial setting—rather than attacking solutions in a proposed rule—helps develop more effective ideas. The ability to ask many questions, and to exchange information easily, enables everyone to better understand the issues involved. The assistance of an experienced mediator or facilitator can assist in the narrowing of differences.

As a result, the process can provide the agency with more and better information than it would normally obtain through the notice and comment process of the Administrative Procedure Act. Having a better understanding through this process of the problems that others would have with different solutions and the difficulty the agency would have in developing a rule should make the rule more acceptable to all of the parties and should make them less likely to challenge it. With these benefits, the agency should have a more successful rulemaking. Indeed, even where we were not able to achieve consensus on a final product, the process has proved to be valuable. For example, in one such negotiation, progress was achieved on many issues prior to the premature termination of the negotiations and the Department had a much better understanding of the problems and potential solutions at issue in that proceeding.

This does not mean that regulatory negotiation is the ultimate solution for all rulemaking issues. There are rulemakings where this added step would be unnecessary, where there would be insufficient trade-offs available to foster meaningful negotiation, or where the issues would be considered by the parties to be non-negotiable.

The Department also recognizes that the process can add costs and time to the initial stages (for example, through the need to hire a mediator). These extra costs

may be well worth it over the long-term (for example, through reduced litigation or enforcement expenses). However, up-front costs are harder to assume in these times of limited budgets. And various constraints often make it difficult to add the extra step of negotiations. As a result, we have encouraged a variety of steps to keep costs low and to expedite the establishment of committees within the Department of Transportation. We also believe that the provisions contained in S. 1224 may provide valuable assistance to agencies by allowing them to accept gifts to help them conduct negotiations. Furthermore, the study called for in S. 1224 may lead to further improvements that could expedite the process. We are encouraged by the inclusion of both of these provisions in the reauthorization legislation.

The Department agrees with the general purpose of the Negotiated Rulemaking Act, which is "to encourage agencies to use the process when it enhances the informal rulemaking process." As we have said before, we do not believe that the Act provided us with any additional authority but, rather, generally codified the existing practice of those agencies that were using the process, encouraged others to use the process, and provided a general framework for that process. It is also worth stressing the importance of 5 U.S.C. 581, which states that the Act is establishing a framework and should not "be construed as an attempt to limit innovation and experimentation." An agency should not be discouraged from using negotiated rulemaking or even less formal arrangements for fear it might have to explain any deviations, and the committees, themselves, should have some discretion—by consensus—in using different approaches.

With respect to encouraging use of negotiated rulemaking, the former Administrative Conference of the United States played a valuable, neutral role in this regard and in providing helpful guidance and training. For that reason, we support the provision of S. 1224, which provides that the President designate an agency or establish an interagency committee to continue these functions.

The Department has benefited from its use of the regulatory negotiation process. We strongly support reauthorization of the Negotiated Rulemaking Act and encourage the use of this valuable, alternative form of dispute resolution.

I appreciate the opportunity to testify here today and would be glad to answer any of your questions at this time.

Mr. GEKAS. We thank the witness, and we turn to Mr. Wagner.

Mr. WAGNER. No prepared comments.

Mr. GEKAS. We are thankful for that. The Chair restricts itself to 5 minutes.

The Administrative Conference of the United States, to which reference has been made several times now, does in its one section suggest that in a fixed time—I can't find it now—oh, there is a reasonable likelihood that a committee will reach consensus on a proposed rule within a fixed period of time.

Question: In your ongoing negotiations now, the ones you mentioned, you gave three or four of them, is there a fixed time for conclusion of the negotiations?

Mr. EISNER. Yes. If we do not have a statutory or judicial deadline, we generally establish a deadline. As Mr. Dear mentioned, we will say we are giving the committee *x* number of months to reach agreement, or we will take over the project on our own.

And it was interesting in the first negotiation that we did, the committee did not reach an agreement within that time frame, but unanimously came to us and said, we are making great progress, please give us a little more time. I think they asked for another month, and we gave it to them, and they came up with a proposal in that time frame.

Mr. GEKAS. Do you anticipate there would be a situation where the deadline that the agency has for a rule would end the negotiations; that is, if the time comes by which a rule has to be promulgated, is the natural consequence of that the death of the negotiations?

Mr. EISNER. Not necessarily. I believe we had an experience with that in the mid-1980's where we had a statutory deadline for issuing a rule. There was great interest in the community that would be affected by the rule in using regulatory negotiations, so we approached committee staff on the Hill to ask if we would have any problems if we did not meet the deadline, and based on the support we had from the community to use negotiated rulemaking, they said no.

Mr. GEKAS. I have no further questions of this panel.

Mr. Reed.

Mr. REED. Thank you, Mr. Chairman.

Just a general question. There is an issue in my mind about the composition of these panels, and I—just the basic question is how do we assure that they are truly representative and that they include particularly proverbial small business people in the context of a commercial rule so that after the fact, no one could challenge this either formally or informally as just inside-the-beltway types getting together and representing big interests and promulgating a rule that doesn't comport with the interest of other people? So that general question, if you could address it, Neil?

Mr. EISNER. Yes, Mr. Reed. We follow multiple steps to ensure we don't have problems like that. In the very beginning we have informal conversations with the people we think are clearly affected, and we ask them who they think would be other appropriate parties.

At the second stage we put a notice in the Federal Register, and that is one of the questions we specifically ask. We say, we have identified these persons as being a preliminary list of representatives. Do you think there is anyone else who should be a member of the committee?

We publish a final notice, we set up the committee, but we also hold the meetings in public and specifically invite members of the public and give them opportunities to address the committee. If we find that we have made a mistake, we are not perfect, we can always amend the committee charter and add representatives to it.

Mr. REED. Are these committee procedures—and I will confess my ignorance—spelled out in the underlying statute, or is this something that you have developed yourself?

Mr. EISNER. The statute speaks in generalities. I don't think it goes into that kind of detail, but it calls for publishing a notice in the Federal Register.

Mr. REED. So, there is sufficient guidance, you feel.

Ms. Liebman.

Ms. LIEBMAN. I think Mr. Wagner will address that.

Mr. WAGNER. I think Neil answered that very well.

I would just add one word of caution in terms of negotiated rulemaking, one which we have all heard, of the great benefits of using the process. But also the caution is that Congress should avoid mandating to Federal agencies tight time frames by which to arrive at a rule. Once you put that burden on the part of the agency, in order to fully explore all processes in trying to resolve a rule, then you are really handcuffing all of those interests in order to provide better guidance.

Mr. REED. Let me follow up. That is an interesting point.

Have you felt either directly or from anecdotal evidence that a choice was made to abandon a negotiated rulemaking because of the short time frame; i.e., someone said we would love to negotiate a rulemaking, but the statute says we have to have the rule in place in 12 months. Therefore, we are just going to plow ahead as we usually do.

Mr. WAGNER. I am not aware of any.

Mr. EISNER. That is a factor I have heard people mention. We have to have a rule on it. It could be for safety reasons or for statutory deadlines, but it is a factor that enters into their mind, and it may stop some from happening.

Mr. REED. I must confess as a member of what used to be called the Education and Labor Committee, in several education bills we mandated negotiated rulemaking. And we did that because, in fact, we understood there was a large number of people that wanted to participate actively. In fact, they were participating actively as we were trying to get the law done, and we said, why don't you participate later when we finish this, so we are going to do this rulemaking.

The other aspect of that I think, too, is the notion that there is some deep suspicion sometimes of not only the timeliness but also the ultimate substance of these rules. And as a result, I think that is one of the motivating factors that we look to when we mandate a negotiated rulemaking, to assure all the interested parties that they would have their say in the rule. That is probably more context to you than response, but I think it might help for you to understand sometimes what we are thinking about.

Are there any other comments you would like to make?

Ms. LIEBMAN. I was just going to comment that one of the concerns about having specific mandates in specific substantive statutes is that it could be read that if that statute requires that, then the one that doesn't require it doesn't permit it, and in our view the blanket authorization contained in the Regulatory Negotiation Act itself pretty clearly unambiguously allows it across the board.

Mr. REED. Just a technical classification would be useful simply saying that statutes that mandate negotiated rulemaking don't preclude the use of negotiated rulemaking in other places?

Ms. LIEBMAN. Comment to that effect in history perhaps, yes.

Mr. REED. Thank you, Mr. Chairman.

Mr. GEKAS. We thank the panel for the testimony. The subcommittee stands adjourned.

[Whereupon, at 11:41 a.m., the subcommittee adjourned.]

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